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RECENT LEGISLATION IN MASSACHUSETTS.[1]

We renew our yearly griefs in the examination of the legislative harvest of 1855. Five hundred and seventy-eight "laws and resolves," of which some two hundred and fifty are designated as "General," attest its fruitfulness, and invite the gratitude of the profession. The number of those denominated "laws," which are not private or local in their character, amount to about one hundred and sixty only.

The large number of private enactments calls our attention again to an evil which we have already considered. The legislature assemble for the benefit of the Commonwealth, not to pass laws for one man or any separate body of men, and a case of more than ordinary exigency ought to be made out to require the action of its slow and expensive machinery in behalf of individual citizens or private interests. Excluding from the general acts, technically so called, the large number of statutes which, though receiving that name, in reality concern only separate and special interests, such as acts of incorporation, we see that the number of statutes matured by the legislature of a really public character is comparatively small. And, if we carry the inquiry into past years, and remember that this is probably not an unusual proportion, perhaps less than usual, it will readily be perceived without any mathemati-

[1] General Laws and Resolves passed by the Legislature of Massachusetts during the session of 1855.

cal calculation, that a very large portion of the time and labor of honorable members must have been devoted to private interests, an amount of time and labor so great that it can only be justified by some stringent exigency. A step in the right direction was taken a few years ago, in 1851, by the enactment of a statute providing for the voluntary formation of banking corporations. In 1853 the House retrograded, and filled up the statute book with special acts in favor of banks.

We take it to be a fundamental principle of American politics, that no man or body of men is entitled to privileges above their fellow-citizens, and an equally fundamental principle of wise government, that, whenever it is possible, the community should be regulated by laws general in their scope and applying equally to all classes. It should be the aim of human rulers, — we say it with reverence, — to imitate, so far as human weakness will permit, the wise order of Providence by which the operations of the universe move on regularly and harmoniously under laws alike in every part of space.

Special privileges, special exemptions, attempts to remedy evils by private, temporary and local enactments, bespeak the inexperienced, and sometimes the dishonest legislator. Undoubtedly this course must sometimes be resorted to, but when it is — when the question is to be determined whether any persons or body shall be taken out of the general laws of the realm, it is certainly desirable to secure the best mode of ascertaining the wisdom of such exemption under the most impartial influences. When the Commonwealth of Massachusetts is asked to pledge its credit for millions, for the benefit of a part of its citizens — when it is solicited to intrust a portion of its sovereignty to a few, and to permit them, supported by the whole power of the State, to seize upon the property of an individual, lay waste his home, and deprive him of his patrimony, for such compensation as others shall see fit to award him, or to extend special privileges of pecuniary value to a few, we first refer the question to a committee of inexperienced representatives, — we mean no disrespect, the majority must always be inexperienced, — we impose no obligation upon them to investigate the matter by those sound and strict rules which we prescribe before a man can be compelled to pay his creditors a penny, — we leave them subject to a multitude of outside influences, — when their opinion is obtained, we cast the subject into the hands

of three or four hundred men, swayed consciously or unconsciously by all the disturbing influences to which humanity is subject, and then expect, or act as if we expected, a just and impartial decision. If private interests were not at work to prevent it, something might be done to mitigate these evils. The private bill system of legislation in Great Britain has been more active than here, and its evils have been appreciated. Says the Edinburgh Review for January, 1855:—

"We impress on the minds of our law students that the principles of justice are immutable, and that positive laws should ever have an equal and general application — that it is for the legislature alone to make them — the judges of the land to decide on their application — that for money, influence, or favor, no variation should be made: we call to mind the struggle between the nation and the prerogative — the orthodox doctrines enunciated in Magna Charta, and vindicated by the bill of rights; and we still imagine ourselves secure in the constitutional guarantee that '*nulli vendemus, nulli negabimus aut differemus justitiam aut rectum:*' but after a short experience of the practices of private bills, the young lawyer soon discovers that these notions are not now in fashion. Our private bill system offers the greatest incentive to the practice of *canvassing* for the votes of the committee — the most substantial ground for undermining the public confidence in the personal integrity, independence, efficiency, and honor of their legislators. A modern parliamentary committee, with the encouragement it affords to personal canvassing, — its reckless expenses, — its entire disregard of the forms of law or the universal principles of jurisprudence, — serves to encourage the promoters of almost any private scheme requiring the sanction of the law, if properly backed by wealth and influence. Our constitution declares that parliament, like the Queen, can do no *wrong;* but, as once gravely observed by a learned judge, parliament can do things which sound *very strange.* One day a City Coal Act, another a North Wales Railway Act, take their places in our statute book. This session we hear of thousands — a few years ago of millions — being squandered in *parliamentary expenses.* The legal investigation of a claim to twenty guineas, or to half an acre of land, is exclusively entrusted to the most learned and experienced lawyers, whose responsibility is secured by the strongest guarantees, whose conduct is uniformly above all suspicion, whose lives have been devoted to the study of jurisprudence and the examination of evidence, while in the case of those vast conflicting claims that are submitted to the arbitration of parliamentary committees all guarantees are wanting for the legal competency, the general efficiency, or even the integrity of the judges."

This same writer, with that charming ignorance of the laws and political system of our country which our transatlantic friends continually display, not distinguishing between the legislation of the several States and of the Federal Union, and giving credit to the whole for the system of one or two, says:—

"It is a remarkable fact, that although the whole of the private acts of the United States of America up to 1845 are contained in a single 8vo., the local and personal and private statutes of the reign of Victoria alone occupy upwards of seventy huge folio volumes."

"In the United States of America special railway acts are done away with, and general enactments substituted, by which, on compliance with certain conditions, any number of persons, not less than twenty-five, may be incorporated, and undertake the formation of a railway. General provisions are made for the compulsory purchase of land, and the appointment of a commission by the Supreme Court to assess the value, plans of the line being duly deposited with the clerks of the counties through which the line is intended to pass. In this way has the government of the United States obviated the delays, the expenses, and abuses of railway acts, and thrown open such enterprises to general competition."

While the evil has not reached the height in this country, which has been described as characterizing English legislation, we are by no means, as a nation, entitled to claim the happy exemption from all its consequences which the Edinburgh reviewer awards us. It is working among us, and our exertions should be directed to check its advance. Let us consider for a moment the expenditure of time it occasions. We take the statutes of 1855. The first chapter relates to the Danvers Railroad Company. The second to the Old Colony Insurance Company of Plymouth. The fifth enables the Douglas Axe Manufacturing Company to increase its stock. The sixth relates to the Boston Hemp Manufacturing Company. The seventh to the Eagle Fire Insurance Company. But we cannot go to the end of the list in this way. Out of the four hundred and fifty-four acts of 1854, some three hundred and sixty were private or local in their character. Out of one hundred and sixteen days in that session, how many were devoted to these three hundred and sixty acts? One-third, certainly, would not seem an extravagant allowance, if due attention was paid to them. Say thirty-eight days, at $1050 per day, and we find these private acts cost the Commonwealth nearly $40,000 in the per diem of members alone, without estimating other legislative expenses, and the private expenditures consequent upon them, which can never be known. Again, in 1855, if one-third of the session was devoted to private statutes, we have out of the total amount actually paid to the members, including mileage, the sum of $53,866 expended for this purpose, not to mention *incidentals*. Certainly much of this might be saved. It is not difficult to perceive the many evils, more serious than the mere expenditure of money, which the private bill system entails. These bills involve large private interests, to which often members are not strangers, and they are too often in danger of yielding their support to public measures of

questionable propriety, to secure the adoption of those private measures in which they are personally interested. The various influences under which members may act, and the practices of "lobbying," need not be cited to remind our readers of the dangers attendant upon the whole matter. It is by no means impossible to suggest at least a partial remedy for these evils.

Let general laws regulate the terms upon which those franchises and privileges, of such a character that they may reasonably be extended to various individuals, should be extended to them upon specified terms without legislative action. As to those cases which cannot be brought within such general laws, a system like that sketched out in the resolutions of Lord Brougham upon this subject might not unwisely be adopted.

Lord Brougham proposes that a court or board should be appointed by the executive, removable by joint address of both houses, to which private bills should be referred; that it should have the power of investigating the subject, deciding questions of law, as a court, subject to the opinion, "in case it shall think fit," of one of the four courts of England, calling on a jury to determine matters of fact, if the parties desire and the court think fit, awarding costs, &c.; and that it should report these bills, with such changes as are deemed proper, to the house of parliament by which they are referred, which should act upon them without other reference to committees. This would leave the whole matter ultimately in the hands of the legislature, enlightened and restrained by the action and investigation of the court. We are not prepared to say that it would not be wiser to limit their power in such cases, by requiring a majority of two-thirds, for example, to adopt any private bill in opposition to the deliberate judgment of the court; but it would be a gain, without this, to secure a candid investigation by a small and permanent body, held to responsibility, and no more liable to private and extraneous influences than the judges of ordinary courts of justice. We believe that the public interests would be promoted by such a reference of public as well as private acts. In this way, the careful investigation of learned and experienced men would detect blunders and unintentional interferences with other branches of the law, and many consequences of an act apt to escape the observation of less experienced persons, would render it clear and simple, and relieve courts and the people of many doubts

and uncertainties, without, so far as we can see, exposing the State or its subjects to any serious evil. Any one who considered our system of law-making, might reasonably doubt whether we practically recognize any thing that could be called the science of legislation. A science implies labor and study; it implies the devotion of certain individuals whose experience discovers fundamental principles; it implies a subject of study on which pupils do not become masters *per saltum*. Among us, any body can make a law. A little skill in whittling is all that is necessary.

Human wisdom is at best short-sighted, and incapable of foreseeing every contingency. Human language is at best incapable of expressing every thing with that precision which excludes controversy as to its meaning. And when human wisdom and human language are to be employed in providing for certain contingencies, and expressing with precision certain rules, those who have rarely contemplated those contingencies, and have studied and practised but little the art of expressing these rules, are by no means fitted to use even this imperfect wisdom and its imperfect instrument to the best advantage. Let it be said that our system of government wisely requires the final submission of all laws regulating the interests of the community to men chosen indiscriminately from all classes. We welcome them to the labor. We are glad that such subjects should be considered in all the lights that every interest, that every private experience or local feeling, that the knowledge and ignorance, if you please, that the habits, customs, wishes, and various situations of all classes and conditions of men can throw upon them, and that all laws should derive vitality only from the consent of their representatives. But this need not preclude them from availing themselves of the experience of others, nor, in availing themselves of that experience, need the ultimate control of the substance or form of legislation be surrendered.

The number of those who can tell what is right when they see it, is much greater than of those who can discover it for themselves; and of those who can recognize an error as such, after it has been detected, than of those who can detect it unaided. If every law, before it undergoes the final ordeal of legislative action, were first submitted to a permanent commission whose duty it should be to investigate the subject carefully, ascertain the bearing of the

new bill upon other subjects, correct its faulty language, and suggest modifications designed to carry out its original purpose, it is not easy to see that honorable members would suffer from this supervision of their labors. Some fond flights of fancy might be pruned. Some sly legislation might be detected. Our profession might lose some of that profitable business which the annual blunders of lawmakers create for them; but money and time, credit and patience, and, perhaps, some profanity might be saved for the community. We are not so Utopian as to believe that legislatures will ever stop blundering, or that laws not fit to be made will not be made. We would fain do something to bring our State to the model of a perfect Commonwealth, and to protect her from that annual stultification which it seems to be her lot to encounter.

We charge nothing against the legislature of 1855 above its fellows. It has not been niggardly towards corporations. One hundred and seventy-six out of four hundred and eighty-nine acts, either create new corporations or extend the privileges of those already existing.

Now, in part at least by its aid, the Massachusetts schoolboy may learn in a corporation school to read a corporation newspaper, or follow his fond father up a corporation avenue to a corporation exhibition of horses. The weary traveller may rest his tired limbs at evening in a corporation hotel. Mrs. Partington may sweeten her tea with corporation sugar by a fire of corporation coal carried over a corporation canal, and laden in a vessel towed by a corporation tow-boat, or brought in a corporation steamboat and taken across a corporation ferry to a corporation dock, and landed on a corporation wharf. The Virginian may swear at a Yankee corporation clock pedlar. The lumberman may swing a corporation axe; the malefactor swing on a corporation rope; and the honest man, unless he prefers a corporation homœopathic hospital, may breathe his last in the arms of a regular corporation physician.

We do not say this is worse than ever before. But it tempts us to ask whether the talents and time of our legislators must be yearly employed to provide for such things?

We have devoted more space and words to this subject than we can reasonably expect will be heeded, and must return to the task of examining the last annual addition to the laws under which lives, liberty, and property are held in the State of Massachusetts. We do not propose, — indeed it would be impossible, — to consider all the pro-

ducts of the last year in detail. Nor can we undertake accurately to classify statutes which relate to various subjects, each touching more than one branch of the law. We propose to refer only to those which seem most conspicuous and important, with such passing criticisms as the perusal of the pamphlet before us suggests.

I. The class of acts which will perhaps first attract the attention of lawyers, is that which relates to the remedy, or to the various tribunals and modes of proceeding. We shall not, however, hold ourselves strictly to this classification in referring to acts of a kindred nature to those which it brings before us.

Among these we may rank several statutes for the establishment of police courts in various places. Acts providing for their establishment in various places were passed in 1854, and now Chelsea, Williamstown, Roxbury, Lee, and Chicopee are provided with these tribunals. These courts ought to be alike. Few things are worse than a set of local and dissimilar tribunals, administering a different law or undertaking to administer the same law under different rules. And we are not aware, of any material difference in the provisions of these various statutes. Indeed, a choice morsel of clumsy writing which fell from the Whig legislature last year, has been picked up and appropriated by their successors, in the act establishing a police court in Chelsea. (Stat. 1854, c. 257, § 22; Stat. 1855, c. 26, § 3.) But if they are to be all alike, one well digested statute providing for their establishment in all towns of a certain population, is better than to open the way for blunders and covert legislation. The acts establishing these tribunals in Chelsea, Chicopee and Lee, possibly by the carelessness of the persons who drafted them, of the committees who reported and the legislative bodies who acted upon them, would seem to give exclusive jurisdiction to the Police Court, when the parties reside in the town and the defendant is served in the county, of that class of cases in which, by previous laws, justices of the peace and the Court of Common Pleas had concurrent jurisdiction. This is guarded against in the acts establishing courts in Roxbury and Williamstown. Such things are in part attributable to this system of multiplying special acts.

We do not ourselves feel satisfied of the wisdom of establishing the Superior Court for the county of Suffolk. Every thing that tends to localize the administration of justice, we believe to be injudicious.

The public interests are better served, the laws and judicial practice of the Commonwealth grow into a more harmonious and perfect whole, when administered by the same judges in all parts of the State. All will agree that if this system were carried into effect throughout the State, and judges appointed for every county, it would be objectionable. Why, then, single out Boston?

But, after all, this court is nothing but the Court of Common Pleas swelled out at one end. We see no material change necessarily effected by the act which might not easily have been effected by an enactment in regard to the jurisdiction of the Court of Common Pleas in the county of Suffolk. It is hardly a separate court. By section 21, the judges of the Superior Court and of the Common Pleas "may interchange services and hold mutual consultations on matters of law, and as to rules of practice." We shall never know who is to "preach" at any term. And if there be any advantage in giving the citizens of Boston a court of their own, it is an advantage for the security of which they are wholly at the mercy and convenience of the judges. They may have a judge from another county appointed in the first place, and after they get him, have their cases tried by any one of the six common-pleas judges.

If the court, however, is composed of good material, it will probably satisfy those under its jurisdiction. Its usefulness and longevity depend entirely upon the wisdom with which the Executive selects its members. If the judges are able men, the court will be permanent. If not, it will live no longer and do no more work than a summer fly.

But what will the "solid men of Boston" do for their October litigation? The Court of Common Pleas for the County of Suffolk dies on the first Tuesday of October next. On that day the act takes effect, by its terms. Where will the judges be? They cannot be appointed until that day, and it may be doubted whether they can be *nominated* until then, which would postpone their appointment until seven days after, according to the constitution. See *Commonwealth* v. *Fowler*, 10 Mass. 290.

The legislature might have provided for this, and, in some cases, have done so,[1] "by authorizing the appointment before the act . . . . . is to come into operation."[2]

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1 Chapters 79 and 83.

2 S. C. 301.

The act creating the municipal court for the city of Lowell is said to have been declared unconstitutional by high authority, on the ground that it refers a law to the determination of the people, but especially that it refers it to the determination of a part only of those who are to come under its operation. The citizens of Lowell are to accept an act which is to govern the citizens of Dracut and Groton.

Chapter 56 gives either party to a libel for divorce the right to demand a trial by jury. We could wish some provision might have been made for making such trials private, at the pleasure of the court. The same policy which makes the intimate intercourse of married life sacred even from the demands of public justice when the husband or wife is called upon to disclose the secrets of the other, should discourage a prurient curiosity in regard to the follies or frailties which have occasioned the desire to terminate their union.

Chapter 137 provides for an attachment of the husband's property on libels for divorce for adultery, or on account of a sentence to confinement for hard labor, and on all libels for divorce *a mensâ et thoro*, to secure to the wife and children a suitable support. The sixth section is a curiosity of legislative blundering. "In causes for divorce *depending*, the wife shall be entitled to alimony *pendente lite*, &c., whenever the same shall be just and equitable, according to the principles of *the common law*, as administered in the *ecclesiastical courts*." Section seven enacts that in all cases where the Supreme Court is called upon to adjudicate as to the custody of children, pending a controversy between parents, or as to the final possession of the children by the parents, the happiness and welfare of the children shall determine the question. A judicious enactment, in our opinion.

Section eight hardly seems necessary. It provides that a libel for desertion shall not be defeated by a temporary return or other act intended to defeat the former statute; and contains a clause at the end providing that such shall be taken to have been the meaning of said statutes. This seems to be intended for some particular case; but if such was not originally their meaning, we submit that this would have very much the character of a retrospective law. How can the legislature of 1855 declare what that of 1838 meant? Has the right of the legislature to pass declaratory laws ever been recognized in Massachusetts?

Chapter 119 enacts that all actions for damages claimed "*under* the provisions" of the liquor law of 1852, shall be commenced within one year next after the cause of action has accrued. What damages are or can be claimed "*under the provisions*" of that law, we are not informed. Somebody remembered that this statute, if it had any meaning, might be ineffectual, as it left no time to bring an action, in some of the cases referred to, after the passage of this act, and an attempt was made to remove that difficulty by repealing it some weeks after, (c. 398,) and limiting such actions to six months after the passage of the repealing act. Still our ignorance is not enlightened as to what actions are intended. The opponents of the law thought it provided for damages enough, doubtless; but we are not aware that it provides for claiming damages. If the framers of this act meant, as we presume may be the case, damages for seizing liquors in accordance with a clause in that statute, since declared unconstitutional, the more literally appropriate term would seem to be, "against the provisions, or in spite of the provisions of that act." Certainly such damages are not claimed under the act, and some righteous expounding of this limiting act will be necessary to effect its object.

Chapter 132 provides for perpetuating evidence of the notice of the appointment of executors and administrators after one year, by the permission of the judge of probate, on evidence that it was given. This may do very well to help out defective titles, but is it not rather a premium on carelessness?

Chapter 152 is designed to give the jury the *right* to decide both the law and fact in criminal cases. It is thereby enacted, that "In all trials for criminal offences it shall be the duty of the jury to try, *according to established forms and principles of law*, all causes which shall be committed to them, and, after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict, at their election; but it shall be the duty of the court to decide upon the admission and rejection of evidence, and *upon all questions of law raised during the trials*, and upon all collateral and incidental proceedings; and also to charge the jury and to allow bills of exception, and the court may grant a new trial in cases of conviction."

What is "their discretion"? Sir Joseph Jekyll says: "And though proceedings in equity are said to be *secundum discretionem boni viri*, — yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum qui leges juraque servat.* And as it is said in *Rook's case*, 5 Rep. 99 b, that discretion is a science not to act arbitrarily according to men's wills and private affections, so, that discretion which is executed here is to be governed by the rules of law and equity which are not to oppose, but each in its turn to be subservient to, the other."

Now the law of this State, immediately before the passage of this statute, was, that the jury were, if they chose, to decide the whole case, and to accept the decision of the court as conclusive evidence of the law. They then decided both law and facts, as they saw fit; but they violated their duty if they decided the facts against the evidence of the witnesses, or the law against the instructions of the court.

When a juryman undertakes now to pass upon a mixed question of law and fact, what is finally to guide him to a decision as to the law? His own wishes and interests? His own opinion of what the law ought to be? Certainly the jury-room is not made by this act a hall of legislation. Will, then, a conscientious juryman, bound as all would admit, to decide according to the law as it is, though without the sanction of an oath, unless he is sworn to decide the law, "according" to "the evidence," — for the legislature, in undertaking to impose this duty upon him, have not varied the form of his oath to decide "according" to "the evidence," from which a powerful argument has heretofore been drawn that the law was not within the province of the jury, — will he say to himself, "I stand here to declare and expound the law, controlled by nothing but my own judgment. The wisdom of past ages is nothing to me. The tribunal which a thousand years has striven to adapt to this purpose, is to be subordinate to my wisdom, gathered on the exchange, in the field or the shop." Or, if his conscience controls him, will he not say, "My duty is to govern my discretion by the instructions of the officer whose labor and whose duty it is to study and determine these questions, unless I am abundantly satisfied they are erroneous." Let it be remembered that at no time among us has the observance of the maxim, *ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*, had any other guarantee or sanction than a juror's

conscience, and those inquiries will seem to have some pertinence to the question, what change has been effected by this law.

Indeed, the committee who reported it do not seem to contemplate that it will effect any serious change in the ordinary administration of justice, but look upon it as placing a weapon in the hands of the jury for extraordinary cases.

But it may be argued that the power of the jury is even more limited than this, and that the statute, after all, has worked no change. In the cases of *Richard Ray* and *Thomas Grimes*, at the May term, 1855, of the Municipal Court for the city of Boston, it was ruled by an able judge of the Common Pleas, that the jury, under this very act, "had the right to decide both the law and the facts involved in the issue, and they were to decide *both* under their oath, *according to their evidence.*" What evidence can they have of the law? We are informed that in these cases the rulings of the court were considered to be the only evidence on that point. Certainly it has always been the doctrine of England and America, that the law reposed in the bosom of the court, and was authoritatively declared by it.

If the jury are to disregard its declaration at choice, the sayings of our wise judges may be "as goads," but they will not be like "nails *fastened* by the masters of assemblies."

But again. The court are to decide "upon all questions of law raised during the trials." Will there be no questions "involved in the issue" "raised during the trials"?

This cannot refer to questions of evidence or collateral proceedings, for they are separately provided for.

And further. The court are to charge the jury and allow bills of exceptions, and may grant a new trial in cases of conviction. Did the legislature mean to make puppets of the judges? Are they put upon the bench to argue the law to the jury? They would seem to be little else than counsel, if it is really intended that all they do or say is to be left to the uncontrolled discretion of the jury. It is a fundamental principle in regard to new trials, bills of exception, &c., that if there is one good ground on which a verdict may have been found, that all other findings or rulings are unimportant, and may be disregarded. How, if this act makes the jury final judges of the law, can any court ever know, or judicially believe that on a mixed question of law and fact, their verdict has not a legal foun-

dation — a legal foundation in their construction of the law?

But the presumption is, that they will regard the rulings of the court, and their verdict must be set aside until they get a correct ruling. And when they get such a ruling, their verdict is to stand, whatever it may be. Some might call this a farce. We do not call it so, indeed, for we do believe jurors will generally conform to the directions of the court.

This law is the same, or nearly the same, with that of 1807, (c. 140, § 15.) But did that law give jurors the right to decide the law in criminal cases? If so, it gave it to them also in civil cases, and we do not know that any one claims that such a right ever existed in civil cases in this Commonwealth. If that law gave such a right for thirty years, — if during all that time the people and the profession, or any respectable portion of them, supposed such a fundamental principle to have been declared and established by this statute, — it is certainly remarkable that the learned judge who revised the laws of Massachusetts in 1822, and who found and left this among them, when he afterwards delivered the opinion of the court in *Commonwealth* v. *Porter*, 10 Met. 263, should have taken no notice of it, and that no notice, so far as appears by the report of *Commonwealth* v. *Knapp*, 10 Pick. 495, a case cited in support of this right, should have been taken of it then, when it was in full force, unless the language of Judge Putnam is to be considered to have implied such notice.

Can this statute be so read as to mean that the discretion given to the jury relates only to the right of returning a general or special verdict? It would be no answer to say that they had this right before, for it is given by the statute by other words, if not these.

But let the construction of the law be as clear as noonday, it may still fail to effect the intentions of its makers. There is something behind the jury, something above the legislature. We have a constitution which the considerate good sense of the people has preserved to us, and a court who have the capacity and the courage to expound it. And if this law is demonstrably unconstitutional, and subversive of the right of trial by jury, guaranteed to us by that instrument, that court will not hesitate to perform its duty. This question must be brought to a speedy solution; for if the law be what we have suggested, it may be that no conviction had under it will be valid.

Article XII. of the first part of the constitution of Massachusetts concludes as follows:—

"And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, *without trial by jury*." What, then, is trial by jury, as known and practised at the time this clause was made a part of the fundamental law of Massachusetts, and as intended by the framers of the constitution? We have not far to go for authority on this point, if, indeed, this law has not already effected the purpose intended by it, and tossed this question, with other questions of law, into a jury box, at heads and points. The learned chief justice of Massachusetts, in delivering the opinion of the court in the case of *Commonwealth* v. *Porter*, 10 Met. 276, says:—

"We consider it a well settled principle and rule, lying at the foundation of jury trial, admitted and recognized ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province and duty of the jury, to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy and purity of jury trial depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law. And the obligations of each are of a like nature, being that of a high legal and moral obligation to the performance of an important duty, enforced and sanctioned by an oath."

And again, on page 281:—

"Whether, therefore, we consider the rules of the common law, or the constitution and law of this Commonwealth, we are of opinion that it is the proper province and duty of the court to expound and declare the law, and that it is the proper province and duty of the jury to inquire into the facts by such competent evidence as may be laid before them, according to the rules of law for the investigation of truth, which may be declared to them by the court, and find, and ultimately decide, on the facts."

We shall not weary our readers with authorities. The subject of the right of juries to determine the law has undergone repeated and elaborate discussion. Judge Thompson, in the United States Circuit Court of New York, summed up the law on this point in language more brief than eloquent. His answer was, when requested to charge the jury that they were judges both of the law and the fact, "I shan't. They aint."[1] The authority we have cited is enough for our present purpose. Assuming the

[1] Wharton, Crim. Law, 1004.

correctness of Judge Shaw's language, we argue that any change in the institution which deprives a citizen of Massachusetts of his right to such a trial by jury as that he describes, is a violation of the constitution. The constitution secures a trial by jury. It does not define that mode of trial; it found it in existence, and adopted the existing form and system. What that was, the tribunal constituted to expound the constitution has determined, and any change must be effected through a change of the constitution by the people. This was recognized by the late constitutional convention, the majority of whom desired such a change, and undertook to accomplish it in this mode. That the people did not desire it, was declared by a majority larger than that against any other proposition submitted to them. A little consideration may make this matter more clear. Suppose the current should set the other way, and the next enactment on this subject should provide that the jury should report their verdict to the court, and that the court, enlightened and assisted by their opinion upon the facts, but uncontrolled by that opinion, should proceed to enter such a verdict as they saw fit; would this preserve to the citizens of Massachusetts the right of trial by jury, as it is secured by the constitution? But if the Supreme Court are right, it would work no clearer change in this mode of trial, than the submission of questions of law to the final decision of juries enlightened and assisted by the court.

Where shall the legislature stop if this change is authorized? May they not require a majority only, of the jury for a verdict, diminish their number to two, or even to one, and finally dispense with the judges altogether, turn the jurors and the witnesses loose into the court-room, and let them chuck farthing for a verdict? Trial by jury is something more than a name which may be fitted to any thing. It means a mode of trial with forms and rules well known to our ancestors, and which they intended to transmit, unchanged in all its material features, to their posterity.

But if it be admitted that this question is more doubtful than the appointed expositors of our constitution seem to have declared it, is it not wiser, is it not more in conformity with our system of government, to refer its determination to the ultimate source of power, the people, and to rest content with their decision, when obtained?

The clause which we have cited is not the only portion of the constitution which bears upon this. The twenty-ninth article of the bill of rights seems to contemplate a judi-

cial interpretation of the laws, of which this law deprives the citizen accused of a criminal offence.

Selden complained that "equity is according to the conscience of him that is chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience." This act would tend to make law worse than Selden's equity. Jurymen's feet and consciences vary as much as chancellors'.

Misera est servitus ubi jus est vagum aut incertum.

We submit these considerations, especially in relation to the true construction of this statute, rather as arguments than opinions. Upon a subject of such fundamental importance, it is desirable to bring out every thing which justly bears upon it. And we do not feel called upon to withhold such suggestions by the consideration that the source from which they appear to come is humble.

Chapter 283 provides that the limitation of suits against executors, &c., to two years, by stat. 1852, c. 294, shall not apply to rights of action existing prior to that act. Can this act revive an action already barred?

Chapter 157 extends the right of action against executors and administrators an additional year after a failure of a former action from defect of form, &c.; but in the repealing clause, referring to the act of 1852, limiting actions against them to two years, somebody has blundered into designating that as an act of 1854. A similar blunder in referring to a former statute made last year, is corrected in chapter 12, in regard to transitory actions. While an unpretending enactment entitled "an act in addition to an act for the preservation of grouse or heath hen," is perhaps designed to correct an older blunder of the same kind, to which we called attention on a former occasion, and through which the act of incorporation of the Protestant Episcopal Church in Andover was repealed, by an act for the preservation of heath hen.[1]

Chapter 194 provides that proceedings in equity may be by bill, petition, or action of contract, or tort; discovery to be sought in the bill, petition, or declaration, or by inter-

1 Heathen? See, also, c. 210 of the acts of this year, incorporating the Protestant Episcopal Society in Andover.

rogatories under the Practice Act of 1852; the defence to be by demurrer, with a certificate that it is not intended for delay, or by answer, under oath, unless waived.

Chapter 249 provides that no person shall be arrested on mesne process in any action for slander or libel, and in no other action of tort, without an affidavit and a justice's certificate. While by chapter 444, imprisonment for debt is "forever" abolished. Forever! when it can be restored next year, if one hundred and seventy-six out of three hundred and fifty members desire it. This statute, however, provides for arrest in certain cases of delinquency or fraud, which we shall not delay to detail.

Chapter 264 exempts from levy on execution the tools, implements, materials, stock and fixtures of the debtor, necessary for carrying on his trade or business; also the books in the library of a family, student or professional man, to the amount of $500. But whether this limitation applies only to the books, or to the property first named also, does not appear. Was it intended that a man might carry on a cotton mill, and that all the necessary "tools and implements, materials, stock and fixtures," should be exempted from execution?

II. Among the laws in regard to crimes, we find one (c. 116) designed to prevent the arrest of alleged fugitives from labor under pretence of crime, — an offence which we hope our courts will never be called on to punish.

Chapter 118 gives watchmen something like a "billy," and a badge, the former not more than eighteen inches long.

Chapter 135 may be thought to threaten dangerous consequences not only to gamblers, but to other classes hitherto not obnoxious to punishment, — we mean borrowers, persons who labor for wages, &c. Section 1 provides that "any person or persons who shall by the game of three carde monte, so called, or by any other game, device, sleight-of-hand, pretensions to fortune-telling, luck, or *other means whatever*, by the use of cards or *other implements* or instruments, obtain from any other person or persons [not from himself, by a cautious and considerate exemption,] any property of any description, shall be punished as in case of larceny of property of like value." We will not undertake to say that borrowers are in serious danger from this statute, but we do feel at liberty to suggest that more care should be taken in drafting criminal laws.

Chapter 213 imposes a severe penalty for improperly

disposing of collateral security before the debt secured falls due.

Chapter 239 protects us against immature veal.

Chapter 351 is an act which the opponents of the dominant party would designate as an act for the relief of uneasy consciences, otherwise denominated an act to repeal part of the one hundred and twenty-eighth chapter of the Revised Statutes, relating to unauthorized oaths.

Perhaps we do not understand chapter 379. It forbids the employment of children under fifteen years of age in manufacturing establishments, unless they have attended a school of a prescribed character; but whether the child must go eleven weeks, or the school be kept that time, is not clear; or whether he must not go for eleven weeks "next preceding" every instance of employment.

III. The first act of much importance relating to real estate (c. 177) has a criminal element in it. It requires persons conveying real estate, under incumbrances known to them, to make known to the purchaser the existence of such incumbrance, under penalty of fine or imprisonment; and also that when a covenant is made against incumbrances, and incumbrances appear *by the records* to exist, whether known or unknown to the grantor, all damages incurred, in removing the same, by the grantees or their privies may be recovered of the grantor. Does this exclude an action for incumbrances not of record?

Chapter 233 provides for the sale of real estate held by an insane married woman in fee, when necessary for her support, on application to the judge of probate. It would have been well, we think, to have included estates for life, which are certainly within the reason of the law, and to have incorporated a provision for barring dower in case of the insanity of a married woman, under suitable provisions.

Chapter 238 exempts the homestead of a householder from execution to the amount of $800.

IV. There are several acts relating to ways, roads, &c. In one of these (c. 104) a new phraseology is introduced in providing that "*the right* of appeal *shall lie*."

Chapter 146, in regard to gas companies, allows them to open streets, but requires them to restore them, under the sad penalty of being prosecuted "*as* a nuisance." Are the members and officers of such companies the nuisance intended in such case?

V. Among the acts which seem to bear the political complexion of this legislature, the first in order is chapter 28, prohibiting the courts of the Commonwealth from exercis-

ing jurisdiction in cases of naturalization. But we regret to see that the legislature have themselves violated the spirit of this law by naturalizing a production which deserves a place in Miss Edgeworth's famous essay.

Chapter 39 enacts "that the inhabitants of the town of Brewster be and are hereby authorized to prohibit all obstructions to the passage of *alewives*, and also to prevent the catching of the same by any person or persons other than those said town may direct, within the distance of one-fourth of a mile east of the mouth of Mill Creek, or the outlet of Stony Brook, so called, in Brewster Bay, and on the west from said boundary to the line of the town of Dennis, from the twentieth of April to the twentieth of June; *provided*, such prohibition shall not affect the right to take *other kinds of fish* within the time and limits named in this section."

Chapter 314 seems to be aimed at the Roman Catholic Church. It provides that no conveyance for the benefit of any person and his successors in any ecclesiastical office shall vest property in him or his successor, except as already provided for by our laws; and no conveyance for purposes of public worship for the use of any parish, congregation or society, shall vest any interest in any person to whom the conveyance is made, except as above, unless made to a parish, religious society or corporation, organized according to our laws regarding parishes and religious societies. Other sections compel the appropriation of property conveyed to persons in ecclesiastical office, except as aforesaid, to the benefit of the parish &c., using it, and if no parish is so organized at the decease of such person, vest it in the Commonwealth.

This act, however, is perhaps of less real importance than it would seem. If we mistake not, the property of the Romish Church in this diocese was for a long time, and probably still is, vested solely in the Bishops personally, in whom the church seems to place entire confidence. No enactments, no laws short of tyranny can prevent devout Catholics from giving their substance to the church or its officers. Some may think it better to sanction and *restrict* such gifts than to prohibit them. Absolute prohibition, like persecution, is too apt to waken a spirit which secures its object without the aid, or in spite of the rules of law. We approve of laws calculated within proper limits to keep property, in the expressive language of our ancestors, out of "dead hands," but the wishes of donors, too, are to be heeded within certain limits.

Chapter 410 requires the daily reading of the common version of the Bible in the common schools.

Chapter 416, in relation to voting lists and the production of naturalization papers, and c. 439, in regard to distinguishing foreigners in a census, if this can be so called, are all the remaining acts we notice bearing the distinctive political features of the dominant party.

VI. Chapter 140, in relation to the organization of corporations, is intended to guard against a difficulty which arose in the case of the Lechmere Bank. It provides that the first meeting of all corporations, unless otherwise provided in the charter, shall be called by the person or a majority of the persons named in the charter, and said persons so named, and their associate subscribers to stock prior to the date of the act, shall be considered the persons authorized to hold the franchise until the corporation is organized. (17 Law Rep. 76; 16 Ib. 517.)

Chapter 223 makes an impression on paper a valid corporation seal. Why not extend this to private seals? Or is it a lingering fondness for "gluten" which has prevented?

Chapter 290 authorizes manufacturing corporations to issue general and special stock, but imposes a burden in case of the issue of the latter, which is not likely to encourage corporations to avail themselves of the privilege, by making the holders of general stock individually liable for all the debts of the corporation until the special stock is redeemed in full. They will be apt to prefer going into the market at high rates of interest, to incurring this danger.

VII. Chapter 231 seems intended to meet a decision of the Circuit Court of the United States in the case of *The Eastern Railroad*, 1 Curtis, 253, by giving a lien to persons contracting with the owners of a vessel, or "agents, contractors, or sub-contractors" of the owners, or any person employed "to construct, repair or launch such ship or vessel," for labor and materials. The District Court of the United States has not seemed inclined to favor or extend the principle of this decision. See *The Abby Whitman*, 17 Law Rep. 322; *The Sam Slick*, *infra*. By this statute, the lien is dissolved unless a statement is recorded within four days after the vessel sails, in the town or city clerk's office; but otherwise it continues until the debt is satisfied. Courts of admiralty hitherto have imposed what they considered a reasonable limitation when none was fixed by law. It would have been better, if any change

must be made, to fix some period, definite and not too long, which would have given safety to purchasers and not have hampered the sale of vessels. The statute further provides for proceedings to enforce the law in the Common Pleas Court, not excluding, however, the jurisdiction of the United States courts; a proviso for which we are grateful. Any one who is familiar with the judicious and flexible rules of practice which prevail in admiralty courts, will hesitate long before he entangles himself in the meshes of a statutory proceeding before a common law court.

VIII. Perhaps the act of really the greatest practical importance passed at this session, is that "to protect the property of married women" (c. 304.) We have heard little discussion or remark in regard to it. But it has wrought a sweeping change in the whole law of husband and wife, as to future marriages. It is one of those changes of which it is more easy to say that the consequences will be many and serious, if not neutralized by private settlements, than to say what those consequences are. It well nigh severs the bond which has heretofore identified the interests of husband and wife; it gives her the disposition of her property, with certain exceptions, a *locus standi* in the courts, offensive and defensive, and sets her up in business. The husband, indeed, is not altogether destitute. Tenancy by the curtesy is saved to him, nor can his wife bequeathe more than half her personal property to others without his consent in writing. No conveyance of real estate for more than one year, or of stock in a corporation, is valid, without his written assent, or the consent, in certain cases, of specified judicial officers. And he is protected against suits for causes of action originating before marriage.

The property of the wife is exempted from all liability for her husband's debts, but is liable to be taken on execution for causes of action originating against her before marriage. Real estate and shares in corporations standing in the name of any woman now married, belonging to her at her marriage, or conveyed to her since by any other person than her husband, are not liable for any future cause of action against him. Any married woman may do business and retain her earnings, which are liable to all her debts; but we find no express provision subjecting other property to her debts accruing after marriage. Section 8, unlimited as it now is, seems to us injudicious. It provides that any woman married out of the State, if her husband afterwards becomes a resident of this State, shall retain all her rights by the laws of any other State or

country, or by any marriage contract out of this State. Our courts find difficulty enough in interpreting the laws of Massachusetts, but hereafter, on this subject, they must apply those of Kamschatka or China. Or, not to wander so far for improbable difficulties, they are likely enough to be bewildered among those of Louisiana, Texas or California. We find nothing in the statute to relieve the husband from his liability for his wife's support, imposed by the gallantry of the common law. It is to be hoped that the legislature will take care not to be too hard upon husbands.

We undertake no exhausting criticism of the acts of 1855. We have not ventured to notice all that have attracted our attention, nor to put forth our crude speculations upon important statutes which have already exercised abler minds. We pretend only to glance over "the prospect large." And, doubtless, there are many things which our feeble vision has failed to discover or rightly to discern. The varied circumstances of business, and the close scrutiny of private interests, reveal difficulties and suggest perplexing questions which a casual perusal cannot discover. What harvest of these may be reaped this year we do not pretend to calculate.

NOTES TO LEADING CRIMINAL CASES.

King's Bench.

SAMUEL *v.* PAYNE AND OTHERS.[1]

April 21, 1780.

Arrest by officer — Justification — Charge of felony.

A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot.

ACTION of trespass and false imprisonment, against Payne, a constable, and two others. The facts of the case were these: Hall, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search warrant was granted by a justice of peace upon this charge, but there was no warrant to apprehend him. On the search, the

[1] 1 Douglass R. 359.

goods were not found; however, Payne, Hall, and the other defendant, an assistant of Payne's, arrested the plaintiff, and carried him to the Poultry Compter on a Saturday, when no alderman was sitting, by which means he was detained till Monday, when, after examination, he was discharged. The cause was tried before Lord Mansfield, and a verdict found against all the three defendants. At the trial, his lordship, and the counsel on both sides, looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by any body. His lordship therefore left it to the jury to consider, whether any felony had been committed. The rule, however, was considered as inconvenient and narrow; because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine, and commit or discharge.

On this ground, a motion was made for a new trial, and, after cause shown, the court held, that the charge was a sufficient justification to the constable and his assistants, and cited *Ward's case*, in Clayton,[1] 2 Hale's Pleas of the Crown, 84, 89, 91, and 2 Hawkins, B. 2, c. 12, and c. 13.

The *Solicitor General*, for the plaintiff; *Dunning*, for the defendants.

The rule made absolute.[2]

Ledwith *v.* Catchpole.[3]

May 19, 1783.

Where a felony has actually been committed, a constable or even a private person, acting *bonâ fide* and in pursuit of the offender upon such

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[1] Clayton, 44, pl. 76.

[2] The new trial came on before Lord Mansfield, at the sittings after this term, when a verdict was found against Hall, and for the other two defendants.

[3] Caldecott's Cases, 291.

information as amounts to a reasonable and probable ground of suspicion, may justify an arrest.

This was an action of trespass and false imprisonment, tried before Lord Mansfield at Guildhall. The defendant, who was one of the marshalmen of the Lord Mayor of London, pleaded the general issue, upon which issue was joined. The jury found a verdict for the plaintiff with 20*l.* damages.

And now, upon motion for a new trial, Lord Mansfield reported the evidence to have been: That one Smith, who had lost some linens to a large amount, brought one Stevens to the defendant; that Stevens said, that one Madox had called a coach and put Smith's bale of goods into it at a public house; that the plaintiff put his head into the coach; that afterwards the coach stopped at another house; and that the plaintiff met it there; that the defendant, suspecting the plaintiff to have been concerned in the theft from the circumstance of his having been twice so seen at the coach, took the defendant on a Sunday to the plaintiff for the purpose of having him apprehended; that, when they came to him, neither Smith or any other person charged the plaintiff with a felony; that Smith said, "I have lost some cloth; but I don't say that it was he who stole it; I know nothing of that; but stolen it was;" that defendant, being asked by plaintiff what authority he had to arrest him, produced a hanger, and said, "That was his authority;" that he then did arrest the plaintiff, and took him to the Poultry Compter; from whence he was taken the next day before the sitting alderman and discharged.

Buller, J. — This is a question of consequence, and will require some consideration. I think that, if we were to say that a constable is justifiable in this case, we should go the length of saying, that he is to some purposes a judicial officer; which is going farther than has ever yet been adjudged.[1] It would be to allow a constable to examine witnesses, act upon their testimony though he cannot administer an oath, and judicially to conclude, whether there is or is not a reasonable ground of suspicion; and this might be attended with danger. Where a positive charge is made, the party making it is obliged to follow it up with a prosecution, or is himself liable to an action.

[1] *Vide* the case of *The K.* v. *The Inhabitants of Hope Mansel*, in this term, ante, p. 252, and *The K.* v. *Stubbs and others*, E. 28 G. 3, 1788; 2 Durnford and East, 395.

In such case the constable is merely ministerial and bound to take the party up and carry him before a magistrate. The magistrate must then examine into the matter upon oath, which the constable cannot do.

Willes, J. — A felony is committed. The prisoner looked into the coach, where the stolen goods were deposited at the time, and afterwards met the coach, where it stopped. Then called upon, as the constable was, to act, and under such strong circumstances of suspicion, I think it became his duty so to act; and that there ought to be a new trial.

Lord Mansfield. — The first question is, whether a felony has been committed or not? And then the fundamental distinction is, that, if a felony has actually been committed, a private person may as well as a peace officer arrest; if not, the question always turns upon this: Was the arrest *bonâ fide*; was the act done fairly and in pursuit of an offender, or by design or malice and ill will? Upon a highway robbery being committed, an alarm spread and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if under probable cause an arrest could not be made; and felons usually are taken up upon descriptions in advertisements. Many an innocent man has and may be taken up upon such suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing.

It is of great consequence to the police of the country. I think there should be a new trial.

Per Lord Mansfield and Willes, J.

Rule absolute.

The new trial came on at the sittings after this term, when a verdict was found for the defendant.

We have already discussed the right of a private citizen to arrest an offender for crime. 18 Law Reporter, May, 1855, p. 22. We come now to the rights and duties of an *officer* in such cases. His right is very different from that of an individual.

The officer may arrest any one upon a reasonable ground of suspicion that he has committed a felony; and if that be proved, it is entirely immaterial whether a felony or any crime has *in fact* been committed by the party arrested, or by *any* person.

The first enunciation of this doctrine is in the Year Books, 7 Henry IV., Hilary Term, pl. 35. (1405.)

Again, in *Ward's case*, in 1636, Clayton's Reports, p. 44, we find another recognition of the right of an officer to act upon the charge or accusation of a third person, but *Samuel* v. *Payne* was the first distinct adjudication upon this important question of law; we have therefore selected it for our first leading case.

The main distinction between *Samuel* v. *Payne* and *Ledwith* v. *Catchpole*, our second leading case, is, that in the former the party arrested was by a third person reported to the officer as guilty of a felony, and the officer proceeded upon that charge alone, while in the latter there was no charge by any one against the plaintiff in particular, but the officer acted upon his own suspicion that he was the true offender. But it is clear that in either case, if the officer acts *bonâ fide* and upon reasonable grounds, he is not guilty of a trespass.

It was attempted by the plaintiff in *Beckwith* v. *Philby*, 6 B. & C. 635, (1827,) to make an essential distinction between the rights of an officer, whether he acts upon his own suspicion, or upon the charge and accusation of another. It was admitted that in the latter case, it is his duty to make the arrest, and it is not incumbent upon him to prove the actual commission of a felony. But it was claimed that if he assumed to act upon his own suspicion, he then placed himself in the situation of any private citizen, and could justify himself only on proof that a felony had been committed. But any such distinction was entirely negatived by the court, and it was there broadly laid down that a constable having a reasonable cause to suspect that a felony has been committed, has authority to arrest the party suspected, although it afterwards appear that no felony had been committed. This is one of the best cases to be found on this subject. Numerous decisions fully sustain this principle in its entire extent. It is also extended to other peace officers, besides constables. Thus in *Lawrence* v. *Hedger*, 3 Taunt. 14, (1810,) it was held that watchmen and beadles may at common law arrest and detain for examination, any person found walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. And *Hobbs* v. *Branscomb*, 3 Camp. 420, (1813,) is to the same effect.

The same general principles of the law of arrest have been repeatedly recognized in America. *Rohan* v. *Sawin*, 5 Cush. 281, (1849); *Eanes* v. *The State*, 6 Humph. 53, (1845); *Wakely* v. *Hart*, 6 Binn. 316, (1814); *Holley* v. *Mix*, 3 Wend. 350, (1829.)

The Constitution of the United States declares "that the people shall be secure in their persons, houses, papers, and possessions from unreasonable arrests; and that no warrant to search any place or seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Sect. 7, art. 9. Similar provisions exist in most of the State constitutions. It has sometimes been claimed that under these provisions no arrest was lawful in America, without a warrant issued on probable cause, supported by oath. But this doctrine was repudiated by the Supreme Court of Pennsylvania, in *Wakely* v. *Hart*, 6 Binn. 318, (1814.)

Tilghman, C. J., there said: "The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, or in so general and vague a form, as may put it in the power of the officers who execute them, to harass innocent persons under pretence of suspicion; for, if general warrants are allowed, it must be left to the discretion of the officer, on what persons or things they are to be executed. But it is no where said, that there shall be no arrest without a warrant. To have said so, would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So, although not seen, yet if known to have committed a felony, and *pursued* with or without a warrant, he may be arrested by any person.

"And even when there is only probable cause of suspicion, a *private*

person may without warrant *at his peril* make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed, was nothing more than an affirmance of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great, and the decisions *against them* only of modern date, the agitation occasioned by the discussion of this important question had scarcely subsided, and it was thought prudent to enter a *solemn veto* against this powerful engine of despotism."

Some very sensible remarks on this point may be found in *Mayo* v. *Wilson*, 1 N. H. 54, (1817.)

A law of that State, of 1799, authorized selectmen forcibly to stop and detain any person suspected of travelling unnecessarily on the Lord's day. It was claimed that this law was unconstitutional, since it permitted arrests without a warrant supported by oath. But this position was not sustained; and Chief Justice Richardson thus assigned the reasons for such decision:

"By the 15th article of the bill of rights prefixed to the constitution of this State, it is declared that 'no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land.' By the 19th article of the same bill of rights, it is declared 'that every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore all warrants to search suspected places, or arrest a person for examination or trial in prosecutions, for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation.' Coke says, the words '*per legem terræ*' in Magna Charta, and the words 'due process of law' in the statute of 37 E. 3, c. 8, mean the same thing. 2 Institute, 50. And we have no doubt that the phrase, *by the law of the land*, in our constitution, means the same thing as *by due process of law*.

"The question then is, what are we to understand by *due process of law?*

"There is a sound and safe rule for the construction of statutes, which it is believed will enable us to determine with great certainty, the true meaning of these clauses in the constitution, and that is, if a statute makes use of a word, the meaning of which is well known at common law, the word shall be understood in the statute in the same sense it was understood at common law. *Smith* v. *Herman*, 6 Mod. 142.[1] The clause in our constitution now under consideration happens to be a literal translation from Magna Charta, c. 29; 2 Co. Inst. 45. '*Nullus liber homo capiatur vel imprisonetur nisi per legem terræ.*' The phrase '*per legem terræ*' in Magna Charta, has a meaning as fixed and as well determined as any phrase known in the common law. The makers of the constitution having adopted a phrase from Magna Charta, the meaning of which in that instrument was so well known, must be intended to have used it in the same sense in which it has always been understood to have been used there. Sullivan, in his Lectures, 402, has a commentary on this part of Magna Charta. He says, that process of law for the purpose of an arrest is twofold, either by the king's writ, or by what is called a warrant in law. He then says, that a warrant in law is again twofold, viz. 1. A warrant in deed by authority of a legal magistrate, or 2. That which each private person is invested with and may exercise. He then enumerates the cases where

[1] Bacon's Abridg. Stat. 1, § 4.

the law warrants a private person to arrest and imprison another. 1. If a man is present when another commits treason, felony, or notorious breach of the peace, he has a right instantly to arrest and commit him, lest he should escape. 2. If an affray be made to the breach of the peace, any present may, during the continuance of the affray, by warrant in law, restrain any of the offenders, but if the affray be over there must be an express warrant. 3. If one man dangerously wound another, any person may arrest him, that he be safely kept, till it be known whether the person shall die or not. 4. Suspicion, also, when it is violent and strong, is in many cases a good cause of imprisonment, but he who arrests upon suspicion must take care that his cause of suspicion be such as will bear the test, for otherwise he may be punishable for false imprisonment. 5. A watchman may arrest a night-walker at unseasonable hours by the common law. But with respect to persons arrested by private authority, there must be an information on oath before a magistrate, and a commitment thereon in a reasonable time, which is esteemed twenty-four hours, otherwise the person is to be no longer detained. Coke, in his commentary upon Magna Charta, gives the same explanation. 2 Institute, 52. See also 2 Hawkins, P. C. 115; Comyn. Dig. Imprisonment, H. 4; 2 Roll. 559. It seems clear that an arrest, if authorized by the statute or common law, though without writ or warrant in deed, has always been considered in England as warranted *per legem terræ*, by due process of law, within the meaning of Magna Charta, and we have no doubt that any arrest here authorized by our common or statute law must be considered an arrest by the law of the land, by due process, within the meaning of our constitution. We think that the 15th article in our bill of rights was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law."

The attempt has sometimes been made to engraft a limitation to the power of an officer to arrest as before stated, and to allow him to arrest only when there is reason to suspect that the party accused would otherwise escape.

This position was first advanced by Sergeant Russell in *Davis* v. *Russell*, 5 Bing. 359, (1829.) It would be of serious consequence, said he, to the liberty of the subject, and the peace and comfort of society, if a constable is to be empowered to arrest on his own suspicions and judgment, where he has no reason to fear an escape, and may with propriety lay the case first before a magistrate. If such a proceeding were allowable, the most respectable individuals, even judges themselves, might, upon the unfounded assertions of any unprincipled persons, be dragged from their beds to a prison. But this limitation was not sanctioned by the court.

The same effort was made in this country in *Rohan* v. *Sawin*, 5 Cush. 281, (1849,) but with the like want of success. The judge below sanctioned this doctrine, and ruled in accordance with it, but this was reversed on exceptions. "We do not find," said the court "any authority for thus restricting a constable in the exercise of his authority to arrest for a felony without a warrant. The probability of an escape, or not, if the party is not forthwith arrested, ought to have its proper effect upon the mind of the officer, in deciding whether he will arrest without a warrant; but it is not a matter upon which a jury is to pass in deciding upon the right of the officer to arrest. The question of reasonable necessity for an immediate arrest, in order to prevent the escape of the party charged with felony, is one the officer must act upon, under his official responsibility, and not a question to be reviewed elsewhere.

But to justify an officer in arresting without a warrant on *suspicion* of guilt of any crime, the crime supposed to have been committed must

amount in law to a technical felony. *Rex* v. *Thompson*, 1 Moo. C. C. R. 80, (1825.)

And if the officer arrest upon the charge or accusation of another, that charge or accusation must amount in fact to a charge of felony. *Rex* v. *Curvan*, 1 Moo. C. C. R. 132, (1826); *Commonwealth* v. *Carey*, 14 Boston Law Reporter, August, 1851, p. 161, Sup. Jud. Court of Mass., although it need not in terms specify all the particulars necessary to constitute a full and formal definition of a felony. Id. *Rex* v. *Ford*, Russ. & Ry. 329, (1817.) Here the accusation was that the prisoner had a forged note in his possession. That itself is no crime, but all the judges held that this charge should be considered as imputing a guilty possession; and the arrest on such charge was therefore adjudged legal. This subject was much considered in *Carey's case*, *supra*, and the same principles recognized. Chief Justice Shaw there said: "Nor is it necessary when a third person makes a complaint to a peace officer against a person, and gives him in charge to the officer, that the accusation should in terms technically import a felony; but when the language in its popular sense would import such charge, it is sufficient; as where one said to a peace officer, I wish you to take such a person in charge for having in his possession counterfeit bills, the natural import is, that he intends to charge the party accused with having in his possession counterfeit bills, knowing them to be counterfeit, and with an intent to pass the same, without which incidents such possession would be innocent, and import no criminal charge at all."

For a past affray, therefore, or breach of the peace, being but a misdemeanor, it is clear an officer has no right to arrest without a warrant. *Coupey* v. *Henley*, 2 Esp. 539, (1795.) See also *Rex* v. *Bright*, 4 Carr. & P. 387, (1830); *Regina* v. *Walker*, 25 Eng. Law. & Eq. R. 589, (1851.)

At least not unless the arrest is made within a reasonable time afterwards. *Taylor* v. *Strong*, 3 Wend. 384, (1829.) And in this case the constable made the arrest after he had made complaint on oath before a justice, and while the justice was making out the warrant against the prisoner. It does not distinctly appear *how long* after the discontinuance of the affray the arrest was made, but the court said: "There is room for doubt in this case whether the constable had not delayed too long; but we cannot say that he was *not* justified, under the circumstances, in making the arrest."

An arrest two hours after an assault has been held illegal. *Regina* v. *Walker*, *supra*.

So in *Cook* v. *Nethercote*, 6 Carr. & P. 741, (1835,) it was held, that to justify an arrest for an affray, the affray must have been in view of the constable, and the arrest *during its continuance*. That *such* an arrest is justifiable, without a warrant, is abundantly clear. *Knot* v. *Gray*, 1 Root, 66, (1774); *City Council* v. *Payne*, 2 N. & McC. 475, (1820); *United States* v. *Hart*, 1 Pet. C. C. 390, (1817.)

And all who are aiding and abetting in a breach of the peace may be arrested; as if one stand in the officer's way to hinder him from preventing an affray. *Levy* v. *Edwards*, 1 Carr. & P. 40, (1823); or encourages a person arrested to resist the officer. *White* v. *Edmunds*, Peake, 89, (1794.)

But loud talking in the streets merely will not justify an arrest. *Hardy* v. *Murphy*, 1 Esp. 294, (1795.) Nor conversing with a notorious thief in the street. *Stocken* v. *Carter*, 4 Carr. & P. 477, (1831.) Nor turning to the wall on a "particular occasion." *Booth* v. *Hanley*, 2 Ib. 288, (1826.)

In conclusion, the principles stated in the foregoing note may be briefly stated thus:

First. A constable or other peace officer has a right at common law, to arrest without a warrant any one whom he suspects guilty of felony, whether he acts upon his own knowledge, or upon facts communicated by others.

Second. He may arrest for an affray, or other breach of the peace, if the same be done during its continuance, or immediately afterwards

The right of arrest with a warrant, and the liabilities for not strictly pursuing the directions of the warrant, may be discussed in a future note.

E. H. B.

Recent American Decisions.

Circuit Court of the United States for the District of Massachusetts. May Term, 1855.

The Independence.

Salvage — Claim for when excluded by showing contract for work, labor and service — Evidence.

An outward bound ship having fallen into a situation of danger in Massachusetts Bay, exceeding the ordinary perils of the seas, but not involving imminent risk of loss, a steamer was sent down from Boston to her relief, which towed her to a place of safety.

It was held that this was a salvage service, for which the owners, &c., of the steamer could maintain a libel against the vessel, and to be compensated according to the ordinary principles which are applied by the marine law to such cases, and not upon the ground of a *quantum meruit* for the work and labor performed.

Parties may agree upon the amount of a salvage compensation or the principles on which it shall be adjusted, and such agreement, when fairly made, will be upheld by the courts.

A contract to be paid at all events, either a sum certain or a reasonable sum, for work and labor and the hire of a steamer or other vessel in attempting to relieve a vessel in distress, without regard to the result, is inconsistent with a claim for salvage, and when fairly made, is binding in a court of admiralty.

But to bar a claim for salvage where property in distress at sea has been saved, it is necessary to show a binding contract to be paid for work, labor and services, at all events, and this is a bar.

The 34th section of the Judiciary Act (1 U. S. Stat. at Large, 92,) is applicable only to trials of civil cases at common law, and can have no effect upon the rules of the admiralty law.

The facts appear in the opinion of the court.

Curtis, J. — The ship Independence, belonging to Boston, of the burthen of eight hundred and twenty-seven tons, sailed from that port on the 28th day of December, 1853, bound to Valparaiso, and, while in Massachusetts Bay, was struck by a violent gale of wind, which began

about twelve o'clock of the night after the ship sailed. At three o'clock, P. M. of Thursday, the 29th day of December, the master cut away the foremast and let go the larboard anchor, and she brought up in ten fathoms of water. In about ten minutes a sea struck her, which caused her to break adrift. She continued to drift, but slowly, till seven o'clock, when the master cut away her main and mizzen masts and let go the starboard anchor, and she brought up in about twenty fathoms of water. Her hull was uninjured. The place where she then lay was a bank, well known to fishermen and navigators, which lies north by west from Race Point, the extreme end of Cape Cod, and distant from five to eight miles therefrom. The Independence lay at anchor in that place until about twelve o'clock of the night of Sunday, the first day of January, 1854, when she was taken in tow by the steamer City of Boston, and brought to Boston, where she arrived between nine and ten o'clock on Monday, January the second.

The master of the steamer, for himself and the owners, officers and crew of the steamer, entered his action for salvage in the District Court, and the cause was removed into this court by a certificate that the district judge is related to the libellant.

Three questions have been argued at the bar.

First. — Whether this was, in its nature, a salvage service.

Second. — If so, whether it is to be compensated according to the ordinary principles which are applied by the marine law to such cases, or upon the footing of a *quantum meruit* for the work and labor.

Third. — What, upon either view which the court may adopt, is to be the amount of the compensation.

Most of the principles upon which the first two questions depend, were quite fully stated in the case of *The Versailles*, 1 Curtis, 353.

I cannot doubt that the Independence was in a condition to have a salvage service rendered to her. She was dismasted, lying helpless at her anchors in the open sea, exposed to the winds and seas on every quarter, except the south and south-west. The place was a bank, or shoal ground, and from the account given by her master of his drifting between three and seven o'clock, and the depth of water when he let go his first anchor, and the increased depth where she was finally brought up, the latter place must have been near the outer edge of the bank. There

was such depth of water around the bank, that there was very little probability of being able to hold on if she had drifted a short distance further to the eastward or southward. There was quite a strong current across the bank at each tide, so that in point of fact the chains were fouled while she lay there, and there was hazard of fouling her anchors at each turn of the tide in moderate weather, or upon a change of wind, and although the anchors, if fouled, might be sighted and cleared, yet considering that it actually occupied about four hours to get one of the anchors when the ship was taken in tow by the steamer, and that the other was slipped, and considering also that the ship was lying in such a place on the bank that she had very little ground to spare while sighting her anchors, I think the liability to foul them a circumstance of some importance. At that season very violent gales are not uncommon in that place, and a continuance of good weather is hardly to be anticipated. There was some danger, though I do not think it was great, of being run down in the night, especially if the weather should be thick. The fact that the master agreed to pay four hundred dollars for an attempt to get a letter to Boston advising the claimant of his condition, and that the claimant and some of the underwriters took such immediate and energetic, and manifestly, in our view, expensive measures for the relief of the ship, leave no doubt that they considered her subject to considerably more than the ordinary dangers of the sea.

Mr. Caleb Curtis, who was examined by the claimants as an experienced mariner and underwriter, though he says he does not think the ship was in much danger, also says that he thinks he should have been willing to insure her to the extent of ten thousand dollars at five per cent. premium, which must greatly exceed what he would have asked for an ordinary risk of such a vessel at and from Cape Cod to Boston.

To be in a condition to have a salvage service rendered, a vessel must be subject to something more than the ordinary perils of the sea; but a vessel in the condition I have described is undoubtedly susceptible of having such a service rendered. *The Versailles*, 1 Curtis, 353; *The Reward*, 1 Wm. Rob. 174; *The Princess Alice*, 3 Ib. 138.

There is a wide range between liability to ordinary perils and a condition in which the perils are so great that escape is impossible, or nearly so. I do not think this vessel was in either of these extreme cases. She was

manifestly subject to marine perils differing in kind and degree from the ordinary perils of navigation. To use an expression of Doctor Lushington, in a case somewhat like this, it was exceedingly expedient that she should be —— speedily relieved. But her condition, if not speedily relieved, was not by any means desperate — it was not improbable she might relieve herself, by clearing away the wreck of her masts and getting up jury masts, before she would strike adrift; and it was still more probable that she would receive effectual assistance from others.

I view the case, therefore, as free from all doubt upon the first question, though I do not consider the peril of the loss of the property, which the steamer arrested by its interposition, to have been of so marked a character, or the chances of relief therefrom by other means, to have been so small, that I can declare the service rendered one of great magnitude.

Upon the second question, the answer pleads, in substance, that Francis Bacon, who was President of the China Insurance Company, who were underwriters on the Independence and her cargo, applied to Mr. Tobey, one of the owners of the City of Boston, on Sunday morning, to hire that steamer to tow the Independence to Boston; that Tobey replied that he would ascertain if she was in a condition to go; that the claimant and Bacon met him at the steamer, and were informed by him that the vessel was in a condition to go, but he did not like to send her, though by her policies she had liberty to tow vessels, lest by going she might vitiate the insurance on her cargo; whereupon Bacon agreed for his company and the others interested, to insure her cargo while engaged in the service; and Tobey, having expressed a doubt whether the steamer and her owners would not be held responsible for the nondelivery of her cargo on Monday morning, the claimant personally agreed to indemnify the owners of the steamer from such claims, and Tobey expressed himself satisfied and said the steamer might go; that thereupon Bacon inquired what amount he should charge for this service, and Tobey replied, "I cannot name the sum, for I do not know how long she may be out nor what she may have to do." To this Bacon rejoined, 'Well, Mr. Tobey, on the return of the steamship you shall send us your bill, and if we think it is too much, the sum we are to pay shall be left to disinterested parties;" to which said Tobey answered, "Well, I agree to that."

In support of these allegations in bar of the claim for salvage, the claimant has produced the depositions of Mr. Bacon and of John H. Pierson, who was present at the interview mentioned in the answer, and a correspondence between the claimant and Mr. Tobey has been put into the case. I cannot attach much importance to this correspondence *post litem motam*. Each party had their own views, both of what had in fact taken place, and of the legal obligations which arose therefrom, and without questioning the sincerity or disposition to do justice of either of them, it is the duty of the court to come to its own conclusions upon the pleadings and proofs, and to declare the law applicable thereto.

Mr. Bacon being interested, as an underwriter, on the vessel and cargo, his deposition is not admissible in evidence. Though the thirty-fourth section of the Judiciary Act, 1 U. S. Stat. at Large, 92, has been held by the Supreme Court of the United States to adopt the State laws concerning evidence, that section is applicable only to the trials of civil cases at the common law; and the statute of Massachusetts concerning interested witnesses, can have no effect upon the rules of the admiralty law which exclude interested witnesses, except in certain cases where they are admitted *ex necessitate*. This testimony of Mr. Bacon is not within the exception, and it must be excluded.

The remaining evidence is that of Mr. Pierson. He states that after the parties met at T Wharf, Mr. Bacon asked Mr. Tobey if the steamer could *go down and tow up the ship Independence from where she was*. There was some demur on the part of Mr. Tobey, on account of the insurance of the cargo of the steamer and the steamer. Mr. Bacon said he would insure the cargo of that steamer and that vessel so far that Mr. Tobey was satisfied, and said, let the vessel go. Now I believe I can give you the very words. "Mr. Bacon said, Mr. Tobey, what will you let the steamer go for? Mr. Tobey said he could not name a price, or would not name a price, for he did not know the nature or extent of the service, or something implying that, at any rate; I think those were the very words. Shortly, a few moments after that, Mr. Bacon told Mr. Tobey he wished the boat should go down for the ship Independence, and as he could not name a price, when his bill was rendered for services, if it was too much, he would refer it to impartial persons. Mr. Tobey said, well."

Upon these allegations and proofs, I cannot hold that the claim for a salvage compensation, regulated by the principles of the marine law, is barred. It is incumbent on the claimant in this case to plead and prove such a contract as displaces the right to such a compensation. In my judgment, a contract, to be paid at all events, either a sum certain, or a reasonable sum, for work, labor and the hire of a steamer or other vessel in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a court of admiralty, and any claim for salvage disallowed. A salvage service is rendered when property is saved which is in danger of being lost on the high seas, or when wrecked or stranded on the shore of the sea. *The Emulous*, 1 Sumner, 207; *Bearse* v. *Certain Pigs of Copper*, 1 Story, 314; *The Centurion*, Ware, 482. But an unsuccessful attempt to save property thus exposed to damage, does not constitute a salvage service, or any service recognized by the maritime law as a subject of compensation. I agree also with Judge Ware, that the right of the salvor is merely a right to proceed against the thing saved to obtain his satisfaction, and not a personal claim on the owner, unless he has, by taking possession of the thing saved, thereby rendered himself personally liable for the reward. *The Emblem*, Davies, 68. And I do not understand that the nineteenth of the admiralty rules was intended to change this law. When, therefore, the subject-matter of a contract is a mere attempt to save property, and when the owner, or his representative, or both, become personally liable by the contract, to pay either an agreed sum or a *quantum meruit*, for the labor and service rendered, without regard to its results, the parties do not contemplate, nor engage in a salvage service, but quite a different service. I know of no reason which forbids parties, competent to contract, from *fairly* contracting concerning such a subject-matter, nor do I perceive how a court of admiralty can, after the property has been saved, set aside such a contract and declare that a salvage service was performed. In *The William Lushington*, 7 Notes of Cases, 361, the learned judge of the English High Court of Admiralty declared that an agreement cannot convert that which was originally a salvage service into one of a different nature. This may be true; but I do not perceive why an agreement may not be of such a character that

the service performed under it never was a salvage service, though rendered in saving property exposed to perils of the sea. Indeed we know that such is often the effect of an agreement; as in case of mariners and others, who, by reason of their contract, sustain such relations to the property in peril, that their interposition is not secured voluntarily, but the result of their previous contract, and if third persons have, by a valid contract, stipulated for work and labor and the use of a vessel in attempting to save property in peril on the sea, and that for these payment shall be made, whether any thing is saved or not, such a contract is inconsistent in its nature and objects, and the liabilities which grow out of it, with a salvage service. As Lord Stowell declared in the case of *The Molgrave*, 2 Hag. Ad. R. 77, it is a case of contract and not one of salvage.

I do not intend to be understood, however, that a case in which a contract exists may not also be a case of salvage. The parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted, and such agreements, fairly made, no advantage being taken of ignorance or distress, are readily upheld by the courts. *The Emulous*, 1 Sum. 207; *Bearse* v. *Certain Pigs of Copper*, 1 Story, 314; *The A. D. Patchin*, 1 Blatchf. 414; *The True Blue*, 2 Wm. Rob. 176; *The Henry*, 2 Eng. L. Eq. 564, are instances in which this has been done.

Nor do I intend to express any opinion on the question whether the admiralty has jurisdiction *in rem* to enforce a contract for services in assisting a vessel in distress which are not salvage services. See the opinion of Judge Conklin, 1 Blatchf. 414.

What I decide is, that to bar a claim for salvage, where property in distress on the sea has been saved, it is necessary to plead and prove a binding contract to be paid at all events for the work, labor and service in attempting to save the property, whether the same should be lost or saved. This is a bar. But any thing short of this, affects merely the *quantum* of the compensation, not the nature of the service, and I have been careful to state the opinion I hold on this subject, because it seemed to me that the whole doctrine had not, so far as I know, been explained in any one case, and some misapprehension concerning it seems to have existed in the minds of the very intelligent

gentlemen interested in this case, though I presume not in the minds of their learned counsel.

Now it is manifest that, in this case, there was no express contract to pay for the use of this steamer, at all events; nor that what was contracted for was merely an effort to find and tow up the Independence. It is strongly urged, however, that this is fairly to be implied from what took place. It is suggested that if Mr. Tobey had it in his mind during the interview between himself and Mr. Bacon and the claimant, that he should or might claim salvage compensation, it was his duty to have apprized them of such intention. But, bearing in mind that the nature of the service on which he was requested to send his steamer was *primâ facie* a salvage service, and that it is incumbent on those who would change its character by a contract, to make their intention to do so known, and have the assent of the other party, it seems to me the argument really applies to the claimant and Mr. Bacon, and that if they had in mind not to allow a salvage compensation in case of success, but to pay for work and labor at all events, for an attempt to assist the ship, it was their duty to have made their views distinctly known to Mr. Tobey, and to have allowed him to judge whether he would or would not send the steamer upon such terms. I do not mean to be understood as intimating that there was any intentional suppression by either of those gentlemen of any thing which was then thought to be material. I do not think there was. But if there was any failure, from any cause, to make the necessary stipulations, the consequence of that failure must rest on the party who needs their protection. It is true, that if the claimant and Mr. Bacon had gone far enough clearly to apprize Mr. Tobey that they did not wish to engage his steamer in a salvage service, but did desire to have the steamer make an effort to find and tow up the ship, and that for the work and labor performed a *quantum meruit* would be paid at all events, whether the ship should be found or not, and whether the steamer should be able to do the work or not, and Mr. Tobey, after understanding these views, had sent the steamer, without more, this would have amounted to such a contract as would have barred the claim for a salvage compensation to be adjusted according to the principles of the maritime law. But the evidence does not satisfy my mind that such were the facts. Nothing was said by either party concerning salvage compensation, and of course there was no direct and explicit

notice given to Mr. Tobey that the claimant intended to exclude the idea of such a compensation. Nor was what was said, in my apprehension, inconsistent with such a compensation. Mr. Tobey was requested to let the steamer "go down and tow up the Independence from where she was." He assented. He was asked, "What will you let the steamer go for?" He replied, "he could not, or would not, name a price, for he did not know the nature or extent of the service." Certainly, so far from assenting to a contract which should fix the character of the service, and change it from salvage to mere work and labor, he refused to contract at all, because he was ignorant of the nature and extent of the service desired. All he assented to was, that the steamer should go upon an enterprise which *prima facie* was a salvage enterprise. Some reliance was placed on the fact that when Mr. Bacon finally requested to have the steamer sent, he told Mr. Tobey that "when his bill was rendered for services, if it was too much, he would refer it to impartial persons," and Mr. Tobey said, "Well."

But with the exception of the use of the word *bill*, there is nothing in this even apparently inconsistent with its being a salvage service, and to be paid for as such; and to allow any considerable weight to the use of the word bill, in a conversation between two merchants, and say that because it does not technically describe a claim for salvage, therefore none was intended, does not seem to me admissible.

Some reliance was also placed upon the fact that Mr. Tobey saw the letter which Captain Baker took to the master of the Independence. Excluding Mr. Bacon's deposition, as I am obliged to do, I do not find evidence that Mr. Tobey saw this letter; and if he had seen it, any inference which might be drawn from it concerning the intentions of the parties, would be too remote to affect my judgment.

Upon this part of the case, I am obliged to come to the same conclusion as in the case of *The Versailles;* and though I think it highly probable that Mr. Bacon and the claimant did not expect to pay an ordinary salvage compensation for the service, yet upon the proofs, I must declare that they failed to make a contract which can displace the claim for such a compensation.

The remaining question is, What amount of compensation is proper in this case?

The steamer was one of a regular line plying between

Boston and Philadelphia, and had arrived in Boston on the Sunday morning when applied for to go to the assistance of the ship. She was of the burthen of five hundred and fifty-eight tons, and her officers and crew, all told, numbered twenty-three. There was on board cargo belonging to different consignees, of the value of forty-three thousand dollars. The steamer was of the value of forty-one thousand dollars. There was not time to land her cargo, and it was put at risk in the enterprise. Mr. Bacon undertook, in behalf of the China Insurance Company, and the other companies interested as underwriters on the Independence and her cargo, to indemnify the owners of the steamer against this risk of the cargo of the steamer. It does not appear that Mr. Bacon had authority to enter into this contract, nor that either of these companies ratified his act; and though he bound himself personally, if without authority, yet his personal liability was not what was stipulated for. It is pleaded, but not proved, that the claimant agreed to indemnify the owners of the steamer against all claims of consignees on account of any delay in the landing of their merchandise, occasioned by the departure of the steamer for the ship. In point of fact no such claims appear to have been made, but there was some risk that they might be made.

The promptness with which the service was entered on, and the sufficiency of the skill with which it was conducted to a successful result, are not contested. The time employed was about twenty-four hours. The season of the year and the appearance of the weather when the service was undertaken, are to be considered. For though the weather was not decidedly bad, and proved, in the event, to be as favorable as would ordinarily occur in that locality at that season, yet it was somewhat threatening, and the steamer was worked through a rather heavy head-beat sea, from Boston Light to the ship, under more than her usual head of steam. The towage was performed without damage to the steamer, and, as I think, without any dangerous exertion of her powers. Except in the passage of a boat from the steamer to the ship, for the purpose of putting a pilot on board, there does not seem to have been any unusual risk of life. This passage was made in the night, in threatening weather, the sea being quite rough, and owing to the masts and rigging cumbering the lee side of the ship, it was necessary to board on the windward side. This service required skill, and involved some danger, but

I do not consider it, in the actual circumstances, to have been great. The labor of the officers and men was not severe, and save that one of them was sent in the boat, there was no exposure beyond what is usual in night service. As respects the benefit received by the claimant, the ship and cargo were of the value of $201,000. Her condition, as I have already declared, was one of distress and exposure to unusual perils, but it was far from being desperate, if not succored; and there is sufficient reason to believe that the necessary assistance could and would have been obtained in season to relieve her, if this steamer had not gone to her aid.

The steamer was insured by time policies, with permission to tow and assist vessels in all situations, so that she remained covered during this enterprise.

It appears that while the ship was lying at anchor, about six o'clock on Saturday evening, the steamer bound inward hailed her. The master of the steamer went on board and inquired if assistance was wanted. The master of the Independence informed him he did need assistance, and inquired for what price the ship could be towed to Boston. The reply was, that he had not authority to make any bargain, and the master of the Independence, saying he had sent to Boston by a schooner and expected the R. B. Forbes, steamer, down in the morning, declined to receive assistance without a price being fixed, and, therefore, the steamer went on her way. It was urged that this conduct of the master of the steamer deserves the reproof of the court, and detracts from his merits as a salvor. If there had been any immediate and pressing danger to life on board the Independence, it might be difficult to justify either the refusal to render or to receive effectual assistance by reason of pecuniary claims asserted or denied. But setting aside such danger, I am not able to perceive how I can attach blame either to the master or owners of the steamer, by reason of these occurrences.

The marine law has, for sound reasons, determined that a salvage service is to be paid for as such, and upon principles of compensation more liberal than those applied to work and labor of a different character. These rules are established, not for the benefit of individuals who may perform salvage services, but for the general advantage of all interested in property exposed to the perils of the sea, either as owners or underwriters. Their object is to hold out to those able to make extraordinary exertions to save

property thus exposed, sufficient inducements to cause them to make the attempt; and while administering this system of law, I cannot attach blame either to owners, for failing to give their masters authority to waive the benefit of these principles, or to masters, for refusing to waive that benefit. The master of a vessel in distress may, generally, acting on his own responsibility to all concerned, refuse assistance, to be paid for by way of indefinite salvage compensation. If a bargain is made, a court of admiralty will take care that advantage be not taken of distress to impose unreasonable terms; but one who is under no obligation to interpose for the preservation of property, cannot be treated by a court of admiralty as insisting on what is improper, if he claims only what the marine law, for the general good, has deemed it fit and proper he should have.

Upon the elements above indicated, I am to say what is the proper salvage compensation in this case. I consider the proper sum to be seven thousand five hundred dollars, and the claimant will be decreed to pay that sum into court for the salvors. The libellants may agree on the distribution among themselves, if they can; but their agreement must be reported to the court and sanctioned by its decree. This practice is necessary, generally, for the protection of the rights of the crew, and it is not to be departed from in this case.

District Court of the United States, for the District of Massachusetts. May, 1855.

HENRY N. HOOPER AND OTHERS, *Libellants*, *v.* THE SAM SLICK.

H. & E. KIMBALL *v.* SAME.

Maritime lien — Mass. Stat. 1818, *c.* 290.

Under the Massachusetts statute of 1818, c. 290, giving a maritime lien for materials, &c., the fact that a vessel, on her way from the port at which she was built in Massachusetts, to another port in the same State, was driven by stress of weather, want of provisions, &c., into a port in New Hampshire, does not devest the lien.

Where A. employed B. to build a vessel, by written contract, under which A. was to pay a certain sum at a certain stage of the work, on B.'s furnishing sufficient security, and the balance when the vessel was completed, and B. was then to deliver the vessel to A.; and B. purchased materials for the vessel of C., who did not know of the contract with

A., and who supposed he had a lien upon the vessel therefor; it was *held*, that C. had such a lien, notwithstanding the contract.

The fact that C. charged the materials to B. on his books, before the vessel was completed or named, and without any intention of relinquishing his lien, was no waiver of the lien.

THESE were two libels in admiralty, to recover of the barque Sam Slick and her owners, by way of enforcing a lien upon the vessel, the amount of materials used in the construction of the barque, and furnished by the libellants to the builders, Manson & Fernald. The libels were founded upon the statute of Massachusetts of 1848, chapter 290, which is as follows:

SECT. 1. Whenever a debt is contracted for labor performed, or materials used, in the construction or repair of, or for provisions and stores or other articles furnished for, or on account of, any ship or vessel within this Commonwealth, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariner's wages.

SECT. 2. When the ship or vessel shall depart, from the port at which she was when such debt was contracted, to some other port within this Commonwealth, every such debt shall cease to be a lien at the expiration of twenty days after the day of such departure; and in all cases such lien shall cease immediately after the vessel shall have arrived in any port out of this Commonwealth; *provided*, *however*, that nothing in this act shall alter, or be construed to alter, or in any way affect, the lien as now existing on foreign ships and vessels.

It appeared, by the agreed statement of facts, that the materials in question were used in the construction of the barque Sam Slick, in the port of Newburyport; that they were furnished by the libellants to Manson & Fernald, the builders, and charged to them on their books, the libellants knowing that they were to go into that vessel, and supposing that they had a lien on it for them; and that, with the exception of a partial payment on one of the accounts, they were still unpaid for.

It also appeared that the barque was built under a contract between Manson & Fernald and the present owner and claimant in this suit, Captain Mayo, which contract was in writing, and specified particularly the manner of her construction, and also provided that, at a certain stage of the work, a payment of $5000 was to be made by Captain Mayo, on the builders' furnishing satisfactory security. It also appeared that Captain Mayo paid Manson & Fernald according to the contract; but the libellants did not know, at the time of furnishing the materials, that there was such a contract.

The vessel was completed on or about May 19, 1854,

and sailed from Newburyport for Boston on the 20th, it being the intention of the master to proceed directly to Boston; but soon after leaving the port of Newburyport, and on the same day, in consequence of head winds, an approaching dense fog, and being short of provisions, the barque was obliged to put back for a harbor and provisions; and the port of Newburyport not being a port of easy access for so large a vessel, the harbor of Portsmouth, in the State of New Hampshire, was deemed the most suitable port to go into, and she put into and anchored in the harbor of Portsmouth the same day. And on the next day, and after taking on board a sufficient supply of provisions, she sailed for the port of Boston, where she arrived on the following day, and there remained until she was libelled in these suits, on the 23d of the same month.

The counsel for the claimant contended that the libellants had no lien upon the vessel, because: 1. She had arrived at a port out of this Commonwealth before she was libelled. 2. She was built under a contract with Manson & Fernald, who would have a lien for their pay, and the libellants, being sub-contractors, could not also have a lien, thus subjecting the owner to a double lien; and on this point he cited *Smith* v. *The Steamer Eastern Railroad*, 1 Curtis, 253; and 3. The libellants charged those materials to Manson & Fernald, instead of the barque and owners, which charge, the counsel contended, was a waiver of the lien. He also claimed, under the second point, that Captain Mayo became the owner of the vessel, and that the property therein passed to him, upon his making the first payment towards her; and to maintain this he cited *Woods* v. *Russell*, 5 Barn. & Ald. 942; and *Clark* v. *Spence*, 4 Ad. & Ell. 448.

P. W. Chandler and *William Rogers*, for the libellants; *Charles Mayo*, for the claimant.

Sprague, J., delivered an opinion in favor of the libellants. He said that the first objection raised by the counsel for the claimant appeared a formidable one, on account of the express words of the statute. Liens of this kind did not exist before the passage of the statute, and the libellants must bring themselves within its meaning. The vessel did, literally, arrive at a port out of this Commonwealth, before she was libelled. The question was, whether she should be considered as having done so within the fair

meaning of the statute. The counsel for the libellants had cited the case of *Hancox* v. *Dunning*, 6 Hill, 494, in which it was held by the court, in an opinion delivered by Bronson, J., that though, after a lien had been acquired upon a vessel, pursuant to the New York statute upon the subject, she made a short excursion beyond the bounds of the State, for the mere purpose of testing her machinery, in the course of which she landed and made fast to the dock at Perth Amboy, in New Jersey, remained there about two hours, and immediately returned to her former berth in the city of New York, the creditor did not lose his lien. The New York statute was not in precisely the same words with ours, the words of the former being, "such lien shall cease immediately after the vessel shall have left the State;" but the decision was in point. In that case, the court held that the excursion, though within the letter, did not come within the meaning, scope and purpose of the statute; and that, to avoid the lien, the departure must have been for some purpose of business. In the present case, the libellants had no reason to expect that the lien would be lost by the vessel's starting from Newburyport. Neither party could have anticipated her being driven into Portsmouth. Such an accident cannot be considered to have been within the meaning of the legislature in passing the statute. The policy upon which the law may be supposed to have been founded, would not be promoted by so rigid a construction. On the strength of the decision in New York, and a view of the purposes of the Massachusetts statute, and the circumstances of this case, the court did not think the lien was lost by the vessel's being driven into Portsmouth.

Upon the second point, did it appear to have been in the contemplation of the parties to the contract for building the vessel, that she should become the property of Captain Mayo, upon the first payment, or before she was finally delivered? By the terms of the contract, $5000 was to be paid, at a certain stage of the work, upon the builders' furnishing *security*. That would intimate that Captain Mayo did not hold the vessel as security. It would tend to show that he did not rely upon the vessel as his own. The contract also provides for a delivery of the vessel by the builders to Mayo, after her completion. It is not the case that a vessel in the process of construction usually becomes the property of the employer, *as between third parties*, and for all purposes, upon the payment of the first instalment.

The English decision cited uses the guarded language "as between the parties themselves." In the present case, the libellants had no notice of any contract, or of any ownership by any one except the builders. She was built at Manson & Fernald's own ship-yard; they contracted for the materials, and to all the world they appeared the owners. This case differs materially from the case in Curtis's Reports. That was the case of the repair of an old vessel, known to be owned by parties other than the contractors for repairing.

The answer to the third objection was, that the debt to the libellants was contracted before the vessel had any name; that the charge was made as a mere memorandum, and not as an indication that they intended to rely upon the personal credit of the builders alone. How far was such a charge evidence to show a waiver of the lien? It was not conclusive, but was open to be explained by other evidence. The agreed statement of facts declared that the libellants believed they had a lien. This could not be said if there was an agreement to waive the lien. It was equivalent to saying that they intended to rely upon their lien.

The court were of the opinion that neither objection could prevail. A decree was therefore entered for the libellants.

Court of Common Pleas of the State of Ohio, Cuyahoga County.

THE ADMINISTRATRIX OF JOSEPH SUTCH *v.* THE CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD.

Liability of railroad companies under the statutes of Ohio, for damages from death caused by their negligence, &c. — Reasonable and ordinary care, — Person wrongfully on the track.

This action was brought under the statute, in behalf of the widow and children of Joseph Sutch, to recover damages resulting from his death, which plaintiff alleged to have been caused by the negligence, &c. of the defendant.

It appeared that the deceased, about 9 A. M., on the 6th of June last, was walking toward Cleveland, near the city limits, upon the railroad track in Brooklyn township, a short distance north of the Willey street crossing, but not

on it, when the Toledo morning express train coming in, overtook and struck him, killing him instantly.

Defendant claimed that the accident occurred in consequence of the deceased being improperly and improvidently on the track and land of the company, where he was not discovered by the manager of the train, on account of a sharp curve in the road, until too late to avoid him.

The plaintiff claimed on the evidence that the train was running around a sharp curve, on a descending grade of forty feet to the mile, at a high, unusual and improper speed, being behind time, that no bell was rung or signal given until too late for deceased to get clear of the track; that the alarm whistle was not given until within a hundred feet of the place of collision; and that, by reason of the direction of the wind, and the peculiar reflection of sound from the banks adjacent to the track, the deceased was not apprized of the nearness of the train until the whistle was so sounded; and that, immediately on discovering his danger, he endeavored to effect his escape. It was also shown that at the Columbus and Willey street crossings, which the train had just passed, there was a large amount of travel, and that the railroad track, between and from those crossings into Cleveland, had been commonly used by foot passengers for some years, without objection, as a convenient way of going into, and coming out of the city; also that the deceased might have been seen on the track, and the alarm given him much earlier than it was.

Defendant, on the other hand, claimed from the evidence, that the train was running at its usual and at a proper speed, — that the bell was rung at the crossings and around the intervening curve; and that, as soon as the deceased was discovered, the alarm was given in time for him to have heard it and escape from the track.

The case was elaborately argued by *Willey* and *Carey* for the plaintiff, and by *F. T. Backus* for the Company, the main legal question in dispute being, what effect was to be given to the fact that the deceased was on the track and private property of the company, where *primâ facie* he had no right to be, but where the evidence showed that persons had for years been accustomed to be, passing up and down the track, to and from the city, without objection on the part of the company.

Starkweather, J., in his charge to the jury, said, that the questions arising in the case for their consideration were, whether the manager of the defendant's railroad train,

had been instrumental in producing the injury complained of, by the neglect of reasonable care on his part to guard against it; and, also, whether the injured party might have avoided the injury by the exercise of reasonable care on his part; for if the injured party might, by the exercise of ordinary care, have avoided the injury, but failed to exercise it, he could not hold the other party responsible, the fault, in such case, being mutual; — but that the doctrine in the case of injury by negligence, where the parties were mutually in fault, that the injured party was not entitled to redress, was subject to some qualifications, to one of which qualifications the judge said he would presently advert.

He said that the liability to make reparation for an injury by negligence, was founded upon an original moral duty, enjoined upon all persons in every relation of life, so to conduct themselves, and so to exercise their own rights, as not unnecessarily to injure others, and that the obligation rested upon a railroad company, who put a dangerous power in motion, to use all reasonable care to guard against the dangers incident to it.

It was a question to be considered in this case, "Did the defendants use reasonable care in the management of their train on the occasion of the injury complained of, in guarding against it," — that by reasonable care was meant, not the strictest degree of it, such as defendants were bound to use for the safety of passengers on their train, but by reasonable care was meant ordinary care; and that reasonable care and ordinary care were expressions equivalent to each other, where a usage had been established by long practice, by persons of ordinary skill in any line of business. The practice and usage in such cases, was the measure and evidence of what was reasonable, but that if by the comparatively recent introduction of railroads, no such practice or usage by persons of ordinary skill had been established, so as to be the evidence and measure of reasonable care, then it became a question to be determined in view of all the circumstances of each particular case, and in view of what the exigencies of the case required.

That the defendants in this case, being the proprietors of a railroad, as such, had the same right to the free, exclusive and unmolested use and occupancy of its railroad track, that an individual had to his private property, the rights of both being the same, and subject to the same obligations resting on both, so to exercise their own rights as not un-

necessarily to injure others; that a person going upon the track of a railroad company might, and if without a license, express or implied, would, in legal contemplation, be a trespasser, but if by the manager of an approaching train he was, or might be, seen walking ahead upon the track, it was his duty to give reasonable warning to him of the approach of danger, and to use reasonable care to avoid coming in collision with him, and if *by reason of his failing* to do this, an injury was done to the person, he might recover damages, notwithstanding he was in fault himself by being on the track, for that the mere fact that one person was in the wrong did not necessarily discharge another from due observance of proper care towards him, or from the duty of so exercising his own rights as not to do him any unnecessary injury; and, farther, that although in ordinary cases the manager of a train might have a right to presume that no person would be on the track where he had no legal right to be, and to act upon such presumption, yet that if experience and observation would indicate to him, from the density of the neighboring population, and from the actual long-continued and common use of the track by the public, that it was reasonably to be apprehended that persons might, or were likely to, be on the track, although from an intervening curve they might not be seen, it would be his duty, on approaching such places, to so conduct his train and to use such precautionary measures as ordinary prudence would dictate, to avoid inflicting injury; and should an iujnry happen from a failure to do so, the proprietors of the railroad would be liable.

After referring again to the duty of the party injured to use reasonable care to avoid the injury, and stating that any neglect on his part in this respect would defeat his right to recover, if the neglect of the defendants were established, the judge submitted the case to be determined by the jury upon the principles stated by him, and from all the facts and circumstances in evidence in the case.

The jury returned a verdict for the plaintiff for $1400.

Recent English Decisions.

Queen's Bench, April 27, 1855.

Gould *v.* Webb.[1]

Master and servant — Newspaper contributor — Discharge — Foreign law.

Plaintiff was engaged as European correspondent of a foreign newspaper, and it was pleaded that the engagement was on the terms and condition that he should send a letter of the current news by every steamer, and that he should not draw bills on the defendant before his salary was due, and that plaintiff neglected to send such letters on two occasions, and drew bills before his salary became due:

Held, that these matters were no justification of discharge, and the subject of cross-action only.

It is not necessary, in a plea of foreign law, to set out the law abstractedly and then the facts; but the averments may be general, showing substantially the defence according to the foreign law.

The first count of the declaration. That in consideration that the plaintiff would enter into the employ of the defendant as the European correspondent of the New York Courier and Inquirer until such employment was determined by the customary notice at, &c. Then came the usual averments. Breach, that the plaintiff was wrongfully discharged without the usual customary notice or reasonable cause.

Second count. That plaintiff entered into the employ of the defendant as a contributor to the New York Courier and Inquirer at 150*l.* from year to year, and that defendant wrongfully discharged him without reasonable cause. There were also counts for work and labor and materials.

Plea fifth to first count. That the promise and employment were on the condition that the plaintiff should, by every steamer from Liverpool to New York, forward a paper of the current news, and that he wrongfully neglected to do so on two occasions.

Plea sixth to first count. That the promise and employ-

[1] 25 Law Times Reports, 80.

ment were on the condition that the plaintiff might draw on the cashier of the defendant bills for his salary as it became due, but that he should not draw or negotiate such bills before the salary became due. Breach, that the plaintiff drew and negotiated such bills for salary before it became due.

Pleas ninth and tenth were similar, and pleaded to second count.

Plea thirteenth. As to 50*l.* foreign attachment in the Supreme Court at New York against the defendant as garnishee in an action by a third person against the plaintiff, and that by the proceedings the defendant was discharged as to 50*l.* against the debt of the plaintiff now sued upon.

Demurrer to these pleas.

Barston, in support of the demurrers. As to the fifth and ninth pleas, it is not stated that any injury resulted to the defendant from the not sending papers of intelligence on the occasions specified. It is not alleged that there was any news to send. The contract is an entire one, and cannot be rescinded for these defaults; but if any injury has been sustained, that is ground for a cross-action only. *Fillieuil* v. *Armstrong*, 7 Ad. & Ell. 557; *Lilly* v. *Elwin*, 11 Q. B. 742. As to the sixth and tenth pleas, if the bills were drawn before plaintiff was entitled to draw them, there was no obligation on the defendant to accept them. Lastly, as to the thirteenth plea, the defendant ought to have set out the American law as to foreign attachment, and pleaded the facts bringing the case within it. *Benham* v. *The Earl of Mornington*, 3 C. B. 133.

J. Brown, *contra*. As to the 13th plea, it is not the practice to set out the foreign law in an abstract form, and then the facts bringing the case within it. *McLeod* v. *Schultze*, 1 Dowl. & Lownd. 614; *Woodham* v. *Edwardes*, 5 Ad. & Ell. 771. [By the court. We think this plea sufficient.] Then as to the fifth and ninth pleas, it is stated that the sending of a paper of intelligence by every steamer, was a condition of the contract. [By the court. Condition here merely means that was a stipulation or part of the contract, not that it was a condition precedent. The pleas do not allege any damage from the non-sending on these occasions.] The court cannot fail to see that it must have been injurious to a newspaper. Even one default may be of the very greatest consequence. Lastly, as to the sixth and tenth pleas, these pleas allege that the defendant's credit was

injured by the drawing of the bills. It is a great discredit to be obliged to refuse bills which a party has no right to draw upon you.

Lord CAMPBELL, C. J. — The fifth plea is not sufficient. It alleges merely that the engagement and promise were upon the terms that the plaintiff should send a letter of news by every steamer. Now, that does not allege or show a condition precedent that such letter should be sent by every steamer, but merely a stipulation that the plaintiff should send such letter. We have merely to consider the plea on the supposition that that was part of the contract. Can it be said that, because on two occasions the plaintiff did not send such letter, the defendant was justified in discharging the plaintiff? The plea does not even allege that there was any news. I will suppose that there was a default, and that for such default the plaintiff was liable, but that does not go to the whole of the consideration, and it is no bar to the action, but only gives a right to the defendant to maintain a cross-action for the breach of the contract. The sixth plea is still more exceptionable. It only alleges that it was a part of the agreement that the plaintiff should not draw bills before his salary was due. This plea would be supported if it were shown that the plaintiff had drawn a bill for sixpence more salary than was due. This is no bar. If the defendant has sustained any damage, he may institute a cross-action. The ninth and tenth pleas are like the fifth and sixth, and must be adjudged bad. The thirteenth plea is a good plea. It alleges, substantially, that according to the law of America, there was a proceeding in the Supreme Court at New York, whereby judgment was given against the defendant, as garnishee, in an action against the plaintiff; and the defendant was compelled to pay 50*l.* to the sheriff of New York, and that that operates as a discharge of the defendant's debt to the plaintiff *pro tanto*. This is a good defence, and well pleaded.

ERLE, J. — The fifth plea is no defence. It does not allege that, if the plaintiff should fail to write by two posts, the contract should be at an end. Then, does it show such a failure as would put an end to the contract? I am of opinion, for the reasons already stated, that it does not. The same line of reasoning shows that the sixth plea is bad.

CROMPTON, J. — The matter in the fifth and sixth pleas sounds merely in damages, and does not go to the whole

consideration. The defendant, for any injury he may have sustained in respect thereof, may have a cross-action.

Judgment for the plaintiff on the demurrers to the fifth, sixth, ninth and tenth pleas, and for the defendant on the demurrer to the thirteenth plea.

Common Bench, May 23, 1855.

STEEL *v.* SOUTH-EASTERN RAILWAY COMPANY.[1]

Master and servant — Liability of master.

Where one is employed by another to do work for him under the superintendence of his own servant, and the person employed does something contrary to the directions of the superintendent, and thereby causes an injury, the employer is not liable.

THIS was an action against the railway company to recover damages for injury done to the plaintiff's garden, by reason of a flood of water alleged to have been caused by the servants of the company. It appeared at the trial, upon the evidence of one Eaves, that he was in the employ of one Furness, who, according to his statement, had contracted with the company to construct a culvert across a road, and did the work for Furness, but under the superintendence of the surveyor of the company. But it further appeared that the surveyor directed him to cut through half the road first, and after that part was finished then to cut through the other; and that if that had been done the flood would not have occurred. The jury found a verdict for the defendants.

James, Q. C., had obtained a rule calling upon the defendants to show cause why the verdict should not be set aside, and a new trial granted.

Lush now showed cause. The company are not liable for the injury done by the flood. It was not caused by the work which they had contracted for, but by the mode in which it was done; and although their surveyor was occasionally at the work, it was done contrary to his directions.

Hawkins, in support of the rule. All that was proved was that the work was done, and that under the superin-

[1] 25 Law Times Reports, 129.

tendence of the company's surveyor. The contract was not put in, and the witness, upon examination, said he had never seen it. All that the plaintiff knew was, that some one was doing the work under the superintendence of a servant of the company. They ought to have produced the contract.

Maule, J. — It appeared that the surveyor suggested that the road should be cut through half at a time. If that had been done, there would have been no flood at all.

Jervis, C. J. — I think there was no evidence to go to the jury against the company. It seems to have been taken for granted that Furness was to do the work for the company, under a written contract or otherwise. Their surveyor ordered the road not to be cut through all at once. It was cut through at once, and I think the company is not liable for an injury caused by the work being done contrary to that order. In fact, the flood must have been caused either by the work being done contrary to that order, or it must have arisen naturally.

Cresswell, J. — If a distinct order had been given by the surveyor for the road to be cut through at once, it might have been different. But that was not so.

Rule discharged.

Miscellany.

Late English Decisions — Points in Criminal Law — Evidence — Trustee — Easement — Custom — Dedication of Way — Surveyors, liability of, for want of skill.

Some points in *Criminal Law* have been decided by the Criminal Appeal Court. In *Reg.* v. *Dolan*, 24 L. T. Rep. 279, the facts were, that stolen goods were found in the pocket of the thief by the owner. He sent for a policeman, who took the goods, and the three went together towards the shop of A., where the thief had previously sold stolen goods. When near it the policeman gave back the stolen goods to the thief, who was sent by the owner to sell them where he had sold the others. The thief then went alone into the shop of A., sold the goods, and brought back the proceeds to the owner. It was held that under these circumstances A. could not be convicted of receiving.

The misjoinder of a count for felony with a count for a misdemeanor has been held to be no objection after conviction. (*Reg.* v. *Ferguson*, 24 L. T. Rep. 279.)

B., a carrier, residing at C., was employed only in carrying gloves between the glove-makers there and the manufacturers at D. The sewers

were not known personally to the manufacturers, but B. took to the latter the name of any woman who wanted to be employed, and received for her a number of unsewn gloves, which, when sewn, he brought back in separate parcels, having the name of each sewer attached, and received the money for the sewing to distribute among the sewers; but from the money he received he deducted his own charge. He received several sums and applied them to his own use. It was held that he was a mere bailee, and not a servant, and therefore could not be guilty of embezzlement. (*Reg.* v. *Gibbs*, 24 L. T. Rep. 269.)

When two prisoners are jointly indicted, and a witness called by one gives evidence that criminates the other, the latter has a right, by himself or his counsel, to cross-examine that witness, and address the jury in reply upon the evidence so given. (*Reg.* v. *Luck*, 24 L. T. Rep. 280.)

Some points worth noticing, as to the liability of trustees, were laid down by the lord chancellor, in the case of the *Attorney-General* v. *Alford*, 24 L. T. Rep. 266. What interest is a trustee to pay upon money in his hands which he ought to invest, but does not? Upon this, and how such a defaulter is to be dealt with, it was said: —

"Under some circumstances the court will make executors and trustees liable for the amount of consols which would have been forthcoming if the trust funds had been properly invested. Now I have, ever since I was first at the bar, always felt the question of interest to be one of the most unintelligible questions possible — there is no defining the rule. *Prima facie* every executor and trustee who holds money in his hands is chargeable with having it forthcoming, and to be charged with interest, at 4 per cent.; he is almost always to be charged with interest, because it must be presumed he made interest; and the interest of the court, as it is called, is 4 per cent., which was a sort of medium in former times between that which vigilant persons got, 4, and sluggish persons, 3 per cent.; and this court has always treated 4 per cent. as the interest to be charged. That being so, the court has in latter days broken in upon that principle, and has charged executors with 5 per cent., and sometimes with compound interest — that is comparatively very moderate."

A devisee in trust has been held not sufficiently to represent the persons beneficially interested in a suit for foreclosure against the devisee in trust of the equity of redemption. (*Cropper* v. *Mellersh*, 24 L. T. Rep 267.) A privilege to take water from a well in a certain close, enjoyed by the inhabitants of a township, was held in *Race* v. *Ward*, 24 L. T. Rep. 270, to be a mere easement, and not a *profit à prendre*, and consequently a good custom. Lord Campbell's judgment is well worth reading, for it is a very learned and interesting review of the curious old law involved in this question.

What is a dedication of a way to the public, was the question in *Reg.* v. *Petrie*, 24 L. T. Rep. 271. From 1829 to 1835, a road had been used by the public, when part of it was inclosed by defendants. In 1829, the reversion of the fee was assigned to B. by a trustee, as was supposed, of part of the road that had been inclosed. It was, however, alleged that at this time an infant was in fact the owner of the fee. There was a good deal of contradictory evidence as to who was the true owner, and the judge left it to the jury to say whether there had been a dedication by the owner, whoever he may be. This was held to be a right direction. "The principles," said Coleridge, J., "are perfectly sound and familiar, and the result of them is this, that where there is satisfactory evidence of the user of a road by the public, and the way in which and the time during which that has been enjoyed appear, it is not at all necessary to inquire from whom the dedication to the public first proceeded."

Surveyors, it seems, are bound to bring to their work a knowledge of the general rules applicable to the property they undertake to value, and an action will lie against them for ignorant error. Thus, where in valuing ecclesiastical property, they had estimated for an incoming incumbent as for an incoming tenant, they were held to be liable for not having supplied the reasonable degree of skill contracted for. (*Jenkins* v. *Betham*, 24 L. T. Rep. 273.)

On an indictment for nonrepair of a public bridge, and plea that it was the duty of certain private persons to repair it *ratione tenuræ*, evidence of reputation that the county was the proper party to repair, was held to be admissible. (*Reg.* v. *Inhabitants of Bedfordshire*, 24 L. T. Rep. 268.)— *Law Times.*

Right of the Jury to Judge of the Law — Mass. Stat. of 1855, c. 152. In the recent case of *James H. Guppy*, in the Municipal Court for the City of Boston, indicted for a violation of the liquor law, Judge Hoar instructed the jury, in reference to the late law with regard to the rights of juries, (*ante*, p. 131,) that they had the right, by a general verdict of guilty or not guilty, to decide both the law and the fact involved in the issue; that is, to decide what facts were proved, and whether the facts proved established and constituted the offence charged in the complaint; but that questions of law, except as they were thus involved in the issue, it was not the province of the jury to decide; that they had no more right to *make* laws, than they had to *make facts;* that the laws, as they were enacted and established by the legislature, and held to be valid and constitutional by the Supreme Judicial Court, were binding upon the jury, and to be applied and enforced by them; that if it were otherwise, we should live, not under a government of *laws*, but of *men;* that it could never have been contemplated by the founders of our government and framers of our constitution, that a jury, selected by lot, should decide upon the constitutionality of a statute, and thus render the practical validity and force of an act of the legislature, and the rights and duties of citizens, dependent upon the fluctuating and varying opinions of successive juries, or even of single jurors; that the duty of determining whether the provisions of the statute are, or are not, consistent with the constitution, is one of the gravest duties entrusted to the judicial tribunals of the State; that no inferior magistrate or officer can with propriety assume to exercise the prerogative of declaring a statute unconstitutional, unless in a case where it cannot be submitted to the judgment of the Supreme Court; that a jury cannot do it rightfully, unless, considering the highest tribunal of the State corrupt, and unworthy of confidence, they are prepared, as a last resort, to interpose a shield between the liberty of the subject and oppression, by deciding a question of which no upright decision can otherwise be had.

A Criminal Trial in France. We have had the horrors of French criminal justice this week. However abject and guilty may be the accused, no Anglo-Saxon can witness a prosecution as it is managed in France, with any other than the deepest indignation. The utter absence of any thing like fair play, the vindictive conduct of the case for the commonwealth by the judge, the cowardice of the counsel for the defence, the browbeating of the accused, the grossly suggestive leading questions put to the witnesses, the ardent attempts to explain away, or to torture unfavorably the testimony adduced for the defence, excite pain and grief in all minds accustomed to the impartial, — or when partial, partial to the prisoner, — practice of American and English criminal courts. The culprit may be guilty, — but in God's name what chance would the innocent have

in that dock? The accused was Giovanni Pianori, the regicide. He is a young shoemaker, olive colored, of low stature, with strongly marked features, a bright and bold eye, with slight mustaches, and a good deal of beard around his throat. The *acte d'accusation* discloses nothing not previously known, save some indications which would appear to suggest that he was prompted and paid for the crime in London. Two telegraph messages from the French chargé at Rome asserted that the prisoner was "married, the father of two children, had broken the jail at Servia, where he was confined, being condemned to twelve years of the galleys for assassination, accused of two incendiary fires in February, 1849, and noted for a *terrible assassin*." These despatches are probably true, for the prisoner admitted some of the circumstances as true which they contain. The judge was extremely anxious to bring out in strong relief that the Emperor said, "Don't kill him, don't kill him," — which, by the way, nobody heard. One of the seven policemen was under examination, and this question was put by the judge: "You say public indignation ran so high, you had the greatest difficulty in preventing the accused from being injured." Witness. "It is the pure truth." Prosecuting Attorney. "You heard a voice repeatedly cry, 'Don't kill him, don't kill him'"? Reply. "Far otherwise; I heard every body cry, 'Kill him, kill him.'" Question. "Pshaw! it was the Emperor who told the indignant crowd to spare that wretch." Reply. "That may be, but I did not hear him." Judge. "*En somme*, you are here only to prove the public indignation. That you saw, — you unmistakably saw?" Reply. "Yes, and heard, too." I never read such a defence as the lawyer of counsel for the prisoner presented. I have heard a great many lamer speeches delivered for prosecutions than it. It appears, notwithstanding the unguarded manner of the Emperor in his rides, that the lynx-eyes of the police are constantly watching over his safety. The very walk at which he goes is a measure of protection, rather than an evidence of confidence in the loyalty of his subjects. It is to enable the police (who are in plain clothes and in blouses) to follow him on foot with ease. These police are Corsicans, and when I say Corsicans, I need not add that word is a synonym for desperadoes who stick at nothing, who are skilful with the stiletto and the revolver, — born jurors of Judge Lynch's venue. From the moment the Emperor quits the Tuileries until he passes the Triumphal Arch, he is guarded by a strong police force sufficiently near as to have great chances of being able to prevent a regicide shot. The culprit, Giovanni Pianori, was of course (he plead guilty) condemned to death, — "to the death of parricides," that is, he walks barefooted and black-veiled, clad in mourning, to the guillotine. He will be executed to-morrow or the day after. — *Corr. Boston Atlas.*

A Pugilistic Judge. Justice is vigorously dispensed by the Knickerbocker courts, if we may judge from the following court report, taken from the Albany Register: "Two men were recently brought before a justice of this city, for being drunk and disorderly. One of them began to explain matters, when he was interrupted in his explanation by the justice, who bade him stop, 'not say another word, as he was drunk.' Hunt, the culprit, denied that he was drunk; the justice insisted vehemently that he was, — that he was 'so drunk that his tongue couldn't wag in his head,' and told him to sit down. The prisoner said he 'lied,' whereupon the 'minister of justice' rose in his seat and dealt him a blow across the nose with the back of his hand. This was repeated, and the blood flowed from his nose freely, and he bore the marks of being severely injured. He appealed to the justice that his treatment was abusive, and inquired if that was the kind of justice that was dealt out there. He finally took his seat,

but, laboring under considerable excitement, he could not retain it, and avowed himself as good a judge of the law as the justice, and said that he should have satisfaction, and that the charge that he was drunk was 'a d—d lie.' The justice then seized him by the collar, and, with assistance, ejected him from the court-room, telling him to return when sober!"

Can a Corporation Get Drunk? — That the individual members of it can, and do, is a clear case, and will not be questioned. But can a corporation, in its "corporate capacity," get into what O'Doherty calls a state of "*civilation*," — that is, such a degree of ebriety that the inebriate pronounces the word "civilization" with the elision of the "iz"? It would seem improbable; yet we know a case where the excuse of drunkenness was urged by a prosecuting attorney in a manner to favor the affirmative of the question. It happened some years ago, in one of the northern counties of Vermont, that the *then* "State's attorney," though a man of great legal ability, was rather too fond of "the critter," and with a perversity of habit which we have often seen in others, was pretty sure to drink too deep at the very time when it was most necessary that he should be sober. On one occasion an important criminal case was called on by the clerk, but the attorney, with owl-like gravity, kept his chair, being, in fact, not fairly able to stand on his feet. "Mr. Attorney, is the State ready to proceed?" said the judge. "Yes — hic — no — your honor," stammered the lawyer, "the State — is not — in a state to try this case to-day — the State, your honor, is — *drunk!* — *Boston Post.*

Barristers Bearding each other. — At the trial of the crim. con. case, *Hope* v. *Aguado*, Mr. Serjeant Wilkins asked one of the witnesses what colored beard the Count Aguado's was; Sir F. Thesiger laughed. — Mr. Serjeant Wilkins (to Sir Frederick Thesiger): Why do you laugh? — Sir F. Thesiger: I am only laughing at the turn your cross-examination has taken, Mr. Serjeant Wilkins. — Mr. Serjeant Wilkins: Don't laugh at my expense. — Sir F. Thesiger: I don't laugh at your expense. You have not got a brown beard. (Laughter.) — Mr. Serjeant Wilkins: I have not, and some people have got no beard at all. (Laughter at Sir Frederic's expense.) — The Attorney-General (to the jury). — My learned friends are now bearding each other. (Renewed laughter.) — *Law Times.*

A Particular Registrar. Recently a laboring man, who a few days previously had buried his aged father, presented himself before the registrar of births and deaths, at Overbury, near Worcester, and requested that officer to register the death of his mother also. Preparations being made for complying with his request, he was asked at what hour her decease took place. "Oh," replied the affectionate son, "hur hent dead yitt, but hur soon wull be, so I thought as how you might as well put it down at wunst, for I ha lost hoff a day already over it, and I caunt hafford to loose my time a coming here aghun." On being told that his request could not be complied with, he strode off with a dissatisfied air, muttering to himself that the registrar was "too pertickler by haaf." — *English Paper.*

Lord Norbury. — The *Athenæum* contributes to the anecdotes of Lord Norbury. — A gentleman, who practised wit and professed law, thought that he could overcome the punster on the Bench. So on one day, when Lord Norbury was charging a jury, the address was interrupted by the braying of a donkey. "What noise is that?" cried Lord Norbury. "'Tis only the echo of the Court, my Lord," answered Counsellor Ready-tongue. Nothing disconcerted, the Judge resumed his address; but soon

the barrister had to interpose with technical objections. While putting them, again the donkey brayed. "One at a time, if you please," said the retaliating joker.

Pig Pens Judicially Considered. — In the case of *McComber* v. *the Granite Insurance Company*, the Superior Court of Buffalo recently held that a pig pen was not a building, within the meaning of the question calling for a description of all buildings within one hundred and fifty feet of the premises proposed to be insured, and that, at any rate, if it were, the court could not take judicial notice of the fact. — *N. Y. Com. Adv.*

Notices of New Books.

Foster's New Hampshire Reports, Vol. VI. pp. 578. Concord, N. H. G. Parker Lyon. 1855.

These reports appear with promptness, and in a manner creditable to the publisher. The similarity both of the common and statute law to that administered in most of the New England States, as well as the ability of the court, make them useful to the profession elsewhere than in New Hampshire. It is, perhaps, to be regretted, that the judges and the reporter are not at liberty to exercise a judicial discretion in the selection of cases.

Sawyer v. *Twiss*, p. 345, is an interesting and valuable decision in regard to manure on leased premises. The point determined was, that "manure made upon a farm in the ordinary course of husbandry, is not liable to be attached for the debts of the owner of the land, as personal property, nor separately from the farm itself." The subject of the respective rights of landlord and tenant to manure made on the premises, has been already discussed in our pages. See 16 Law Rep. 481.

We are reminded by the case of *The State* v. *Moore*, 448, in which it is decided that where a felony was procured in Maine to be committed in New Hampshire, the accessory before the fact could not be tried for the procuring in the county in New Hampshire where the principal offence was committed, of the case of the British deserters, *Commonwealth* v. *Uprichard et al.*, lately decided in Massachusetts, where it was held that they could not be indicted here for larceny of property stolen in the British possessions and brought to this State. *Moore* v. *Wilson*, 332, declares the same doctrine lately affirmed in Massachusetts in the case of *Jefts* v. *York*, 4 Cush. 371, that an agent who makes a written contract without authority, does not bind himself unless the contract contain apt words to charge him with a personal undertaking.

Chamberlain v. *Carlisle*, 540, affirms the sensible rule, not always heretofore accepted, that a former judgment is equally conclusive as matter of evidence, as when pleaded.

Abstract of the Laws of the District of Columbia. By M. Thompson, of the Washington Bar. Third edition. Washington, D. C.: W. M. Morrison & Co. 1855. pp. 43.

This would seem to be a convenient manual for those interested in its subject. We are unable to pass judgment upon its accuracy, so far as the laws of the District are concerned; but the fact that this is the third edition, seems to attest its usefulness.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, Henry D	Lowell,	May 8, 1854.	Isaac S. Morse.
Aldrich, Emulous	Milford,	" 14,	T. G. Kent.
Arling, Anderson	Quincy,	April 21,	William L. Walker.
Bailey, Mark	Tewksbury,	Jan. 3,	Isaac S. Morse.
Barber, Asa G.	Bernardston,	May 1,	David Aiken.
Bisbee, Franklin	Sharon,	" 2,	Francis Hilliard.
[1] Bisbee, Franklin	Sharon,	" 4,	Charles Endicott.
Bluxome, Joseph A.*	Roxbury,	" 8,	Charles Demond.
Bosson, Benjamin P.*	Dorchester,	" 8,	Charles Demond.
Bowen, Charles E.	Sheffield,	" 28,	James Bradford.
Brigham, Charles H.	Marlboro',	" 10,	Asa F. Lawrence.
Bryant, Joseph	Marlboro',	" 14,	Isaac S. Morse.
Bullens, Joseph M. †	Lowell,	" 31,	Isaac S. Morse.
Carew, Andrew G.	Worcester,	" 25,	T. G. Kent.
Carter, Joseph B. ‡	Boston,	" 21,	Isaac Ames.
Coolidge, Daniel †	Lowell,	" 31,	Isaac S. Morse.
Cooper, Albion K. P. ‡	Boston,	" 21,	Isaac Ames.
Davis, William F. §	Boston,	" 4,	John M. Williams.
Derbyshire, George	Lowell,	" 16,	Isaac S. Morse.
Dow, Moody	Lynn,	" 24,	John G. King.
Dunham, George C.	West Springfield,	April 2,	James G. Allen.
Dustin, Samuel T.	Quincy,	May 23,	William L. Walker.
Felton, Aaron H.	Marlboro',	" 9,	Isaac S. Morse.
Field, William D.	Springfield,	April 4,	James G. Allen.
Flagg, John D.	Andover,	May 4,	John G. King.
Fowler, Henry ‖	Danvers,	" 7,	John G. King.
Frye, Lewis T.	Marlboro',	" 9,	Isaac S. Morse.
Fulton, Robert J.	Boston,	" 4,	Isaac Ames.
Geer, Charles H.	Boston,	" 14,	Charles Demond.
Goodale, Jay	Springfield,	" 2,	Edward B. Gillett.
Haskell, John C.	Boston,	" 29,	Isaac Ames.
Hill, Calvin B.	Lowell,	" 28,	Isaac S. Morse.
Hollis, John A.	Braintree,	"	William L. Walker.
Jones, James	Cambridge,	" 21,	Jno. W. Bacon
Kelly, John C.	Dorchester,	" 11,	Charles Demond.
McCanny, Francis	Lowell,	" 22,	Isaac S. Morse.
Moffatt, J. L.	Holyoke,	April 2,	James G. Allen.
Morse, James P.	Springfield,	Feb. 27,	James G. Allen.
Nelson, Levi C. ¶	Worcester,	May 11,	Alexander H. Bullock.
Nims, Nelson E.	Boston,	" 3,	Isaac Ames.
Penniman, George	Brookline,	" 30,	Francis Hilliard.
Phillips, Hervey S.	Huntington,	" 29,	H. H. Chilson.
Place, Stephen	Palmer,	April 14,	James G. Allen.
Powers, William L.	Warren,	May 23,	Alexander H. Bullock
Putnam, Rufus A. Jr.**	Boston,	" 26,	Charles Demond.
Putnam, Thomas M. ‖	Danvers,	" 7,	John G. King.
Robertson, Richard A.	Boston,	" 22,	Charles Demond.
Shattuck, Timothy R.	Pepperell,	" 22,	Asa F. Lawrence.
Sloan, Thomas S.	Leicester,	" 18,	Alexander H. Bullock.
Somes, John	Boston,	" 24,	Charles Demond.
Spalding, Joseph R.	Mendon,	" 30,	Alexander H. Bullock.
Swain, Charles P. ¶	Worcester,	" 11,	Alexander H. Bullock.
Torrey, Joseph W.	Milford,	" 14,	T. G Kent.
Trowbridge, John H.	Newton,	" 24,	Asa F. Lawrence.
Weed, Edward C. §	Boston,	" 4,	John M. Williams.
Whiting, Jonathan	Dover,	" 25,	Charles Endicott.
Whittemore, Charles E.**	Boston,	" 26,	Charles Demond.
Whittemore, Joseph H.**	Boston,	" 26,	Charles Demond.
Whorf, Sylvanus H.	Roxbury,	" 15,	Francis Hilliard.
Wiley, David	South Reading,	" 19,	Asa F. Lawrence.
Willis, Hamilton §	Boston,	" 4,	John M. Williams.
Wright, Gurdon H.	Sheffield,	" 9,	James Bradford.
Wright, John	Boston,	" 26,	Isaac Ames.

[1] This case was stayed by the Supreme Judicial Court, for want of jurisdiction in the commissioner.

* Bosson & Bluxome.
‡ Carter, Cooper & Co.
‖ Fowler & Putnam? (Firm not stated.)
** Putnam, Whittemore & Co.
† Bullens & Coolidge.
§ Willis & Co.
¶ Swain & Nelson.